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## More than a "Drop of Justice:" How Nazi-looted Art Cases Promote "Transitional Justice" and Why these Cases Still Matter

### Cover Page Footnote

MARK I. LABATON, practices law in Los Angeles. The author thanks Timothy Cornell for reviewing a draft of this article and providing thoughtful comments.

**MORE THAN A “DROP OF JUSTICE:” HOW NAZI-LOOTED ART CASES PROMOTE “TRANSITIONAL JUSTICE” AND WHY THESE CASES STILL MATTER**

MARK I. LABATON\*

INTRODUCTION

When it comes to Nazi looting, the past is not dead.<sup>1</sup> Nor should it be. Even now more than three-quarters of a century after the Holocaust, Nazi-looted art cases still provide direct justice to victimized families while also advancing broader historical redress known as “transitional justice,” which since World War II has become a means to address mass atrocities through criminal trials, civil litigation, truth reconciliation commissions, memorials, and reparations.<sup>2</sup>

Before annihilating six million European Jews – two-thirds of the European Jewish population – the Nazis smeared Jews before dispossessing them of their civil liberties, citizenship rights, and property. This course of events makes Nazi-looted art cases central to Holocaust history. As memories of the Holocaust fade, the cases valuably memorialize important parts of this history.

Reichsführer Heinrich Himmler implored that the Nazis “must kill *all* the Jews,” because, he added, “if we don’t kill them, their grandchildren will ask for their property back.”<sup>3</sup> Nazi-looted art cases are still possible because the Nazis failed to kill *all* Jews; they also remain uniquely viable in only one nation, the United States. There are several reasons for this. They include:

- Congressional legislation particularly the Holocaust Expropriated Art Recovery Act (the “HEAR Act”), which preempts restrictive state statutes of limitation (“SOLs”) and makes it possible to start cases decades after the Holocaust.
- The American civil justice system. That system historically has promoted groundbreaking cases of political and social import and enables claimants to bring lawsuits against well-heeled art collectors on a contingent basis, without having to post bonds, and does not require losing parties to pay the prevailing parties’ legal fees. American law also allows claimants wide-ranging document and testimonial discovery rights

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<sup>1</sup> William Faulkner said “the past was never dead. It’s not even past.” WILLIAM FAULKNER, *REQUIEM FOR A NUN*, 73 (1951).

<sup>2</sup> See generally, Eric Posner & Adrian Vermuele, *Transitional Justice as Ordinary Justice* 117 *HARV. L. REV.* 762 (2003); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice* 87 *WASH. UNIV. L. REV.* 1043 (2010); Therese O’Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of The Medusa?* 22 *EUR. J. OF INT’L L.* 49 (2011).

<sup>3</sup> MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* 295 (2005).

and litigation opportunities that claimants elsewhere lack. Such discovery is needed to build and develop complex cases as looting disputes often invariably are.

- American substantive law, which is far more favorable to claimants than foreign laws. For example, in most American jurisdictions, one who purchases stolen from a thief – even innocently as well as subsequent purchasers – does not acquire good title to such property; whereas in most European countries an “innocent” purchaser is the presumed owner of such property.<sup>4</sup>
- State and federal courts have been receptive to such lawsuits and have upheld jurisdiction even when the artwork at issue is in a foreign nation.

Only in America can such cases be fully and fairly litigated. This imposes a particular obligation to ensure cases brought are justly adjudicated here. These cases offer an avenue for justice for the heirs of Holocaust victims, many of whom are direct relatives of the victims of heinous Nazi atrocities. For them, lawsuits might provide what Senator Charles Schumer (D-NY), a co-sponsor,<sup>5</sup> described as “a drop of justice in an ocean of injustice.”<sup>6</sup>

Still, those drops are important. Besides offering the possibility of familial redress, these cases further broader benefits of understanding and of transitional justice. In this way, they continue a noble tradition that began with 13 post-World War II Nuremberg War Crimes Trials later followed by the trial in Jerusalem of Adolph Eichmann, a key strategist of the Final Solution, the planned genocide of European Jews. Civil litigation of looted-art cases continues this tradition. Concerning the Nuremberg War Crimes Trial, chief allied trial counsel and Supreme Court Justice Robert H. Jackson, said:

That four great nations, flushed with victory and stung with injury stayed the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.<sup>7</sup>

It was. Between 1945 and 1949, the Allies tried Nazi leaders for waging a war of aggression, upholding eugenic laws, and genocide.<sup>8</sup> But these trials did not address the earlier dispossession of Jews. Nazi-looted art cases do.

This article explores how and why more recent Nazi-looted art cases remain important and timely. It begins by describing the vast scope of Nazi

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<sup>4</sup> See, e.g., *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022). See also, e.g., Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633–34 (2000).

<sup>5</sup> Senators Ted Cruz (R-Texas), John Cornyn (R-Texas), and Richard Blumenthal (D-Conn) were the other co-sponsors.

<sup>6</sup> Schumer Announces Legislation to Help Recover Nazi-Confiscated Art Passes Judiciary Committee; Bill Now Heads to Senate Floor, Sen. Charles E. Schumer Press Release, Sept. 15, 2016.

<sup>7</sup> Justice Robert H. Jackson, Opening Address for the United States, (Nov. 21, 1945) in 1 NAZI CONSPIRACY & AGGRESSION 114 (1946).

<sup>8</sup> *Nuremberg Trials*, History.com, (Oct. 13, 2021) <https://www.history.com/topics/world-war-ii/nuremberg-trials>.

looting, continues by explaining the value of Nazi-looted art cases, then discusses why American courts are uniquely well qualified to adjudicate these cases and why alternative resolution mechanisms (while helpful) are insufficient. It concludes with a discussion of lessons learned from Nazi-looted art cases.

#### I. BACKGROUND: NAZI LOOTING AND POST-WORLD WAR II LOOTED ART RECOVERY EFFORTS

Through outright theft, forced duress sales (often under the color of law),<sup>9</sup> and other nefarious means, Nazi-driven theft and re-distribution of Jewish property included troves of Jewish-owned artworks currently valued at more than \$5 billion.<sup>10</sup>

The scope of such theft is astounding. According to a Senate report, the Nazis “orchestrated a system of theft, confiscation, coercive transfer, looting, pillage, and destruction of objects of art and other cultural property . . . on an unprecedented scale.”<sup>11</sup> From 1933 to 1945, the Nazis: “stole hundreds of thousands of artworks from museums and private collections throughout Europe. This systematic looting of the artwork and other cultural property of Jews has been described as the ‘greatest displacement of art in human history.’”<sup>12</sup>

Numbers illuminate. Ruling Germany and Austria and occupying much of Europe, the Nazis stole or abetted the theft of 600,000 artworks, close to 20% of which has been repeatedly resold were never returned to that arts’ rightful owners<sup>13</sup> or their heirs as masterpieces by Degas, Picasso, Renoir, Van Gogh, and other legendary artists crossed and recrossed national borders.<sup>14</sup>

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<sup>9</sup> See generally, Jennifer A. Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 KAN. L. REV. 75 (2012); MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS (2003); LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1995); JONATHAN PETROPOULOS, *Art Dealer Networks in the Third Reich and in the Postwar Period*, 52 J. CONTEMP. HIST. 546 (2016); see also, e.g., S. Rep. No. 114-394 (2016); see also, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9<sup>th</sup> Cir. 2010); Ardelia R. Hall, *U.S. Program for Return of Historic Objects to Countries of Origin, 1944-1954*, 31 DEP’T ST. BULL. 493, 496 (Oct. 4, 1954); Ronald Lauder, *Helen Mirren Testify Before US Senate Committee on Nazi-looted Art*, WORLD JEWISH CONG. (June 8, 2016), <http://worldjewishcongress.org/en>.

<sup>10</sup> THERESE O’DONNELL, *supra* note 3.

<sup>11</sup> S. REP. NO. 114-394, at 1-2 (2016).

<sup>12</sup> S. REP. NO. 114-394, at 1 (2016), FRANCIS Henry Taylor, *Europe’s Looted Art: Can it be Recovered?* N.Y. TIMES (Sept. 19, 1943) (“Not since...Napoleon Bonaparte has there been the wholesale looting...going on today”).

<sup>13</sup> See, e.g., William D. Cohen, *Five Countries Slow to Address Nazi-looted Art, U.S. Expert Says*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html>.

<sup>14</sup> See generally, JENNIFER A. KREDER, *supra* note 10; MARY LANE, HITLER’S LAST HOSTAGES: LOOTED ART AND THE SOUL OF THE THIRD REICH (2019); cf. Martin Gayford, *Cracking the Case of Nazis’ Stolen Art*, TELEGRAPH (Nov. 9, 2013), <https://www.telegraph.co.uk/news/worldnews/europe/germany/10437728/Cracking-the-case-of-the-Nazis-stolen-art.html>.

The proliferation of Nazi-looted art prompted *The New York Times* in 1943 to publish a front-page article titled “Europe’s Looted Art: Can it be Recovered?” Today, much looted (and disputed) art remains scattered in Europe and America.

With Europe ravaged during and after World War II, dealers, collectors, and museum curators (often Americans) snatched up looted art at “bargain prices.”<sup>15</sup> Reputedly, “[n]ot since...Napoleon Bonaparte has there been the wholesale looting...going on today.”<sup>16</sup> But while the spoils Napoleon collected largely were concentrated in a few known places, the art the Nazis stole or effectively confiscated and redistributed was widely dispersed such that it continues to show up decades later in America, Europe, and elsewhere.<sup>17</sup> Because of its relative post-World War II wealth, much of this art found its way to America, where individual and museum collectors like Theodore Rousseau, curator of the Metropolitan Museum of Art, thought it “absurd” to resist the “fire sales” and “let the Germans have the paintings the Nazi bigwigs got.”<sup>18</sup> So, American collectors, large and small, bought their fair share of such tainted artworks.

After World War II, American soldiers, known as the “Monuments Men,” searched throughout Europe for hidden stolen artworks.<sup>19</sup> The Monuments Men recovered thousands of pieces of looted art in homes, bank vaults, warehouses churches, salt mines, caves, and other places.<sup>20</sup> Still, the Monuments Men could not locate many stolen artworks.<sup>21</sup> The United States then returned many such located artworks to the country of its pre-war “origin” rather than directly to rightful owners.<sup>22</sup> And by 1951, their efforts ended with many stolen artworks, referred to as the “last prisoners” of World War II, never returned to the families from whom that art was stolen.<sup>23</sup>

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<sup>15</sup> See, e.g., JENNIFER A. KREDER, *supra* note 10 (“Museums knowingly acquired or accepted donations of paintings that were—or very likely were—stolen directly from Jews or sold by Jews under duress. Not caring does not equate to not knowing. The law dictates that such transfers were and still are void.”) (Citations omitted); see also, S. Rep. No. 114-394, at 1 (2016); see also, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010); Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 DEP’T ST. BULL. 337, 339 (1951); Ardelia R. Hall, *supra* note 10 at 496; Jonathan Petropoulos, *supra* note 10; *Ronald Lauder*, *supra* note 10.

<sup>16</sup> Francis Henry Taylor, *supra* note 13.

<sup>17</sup> See, e.g., S. Rep. No. 114-394; MARY LANE, *supra* note 15; LYNN H. NICHOLAS, *supra* note 10.

<sup>18</sup> LYNN H. NICHOLAS, *supra* note 10 at 438-439.

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F. 3d 712, 716 (9th Cir. 2014) (“In 1946, the Allies returned much of the Goudstikker Collection to the Dutch government so that the artworks could be held in trust for their lawful owners: Desi, Edo and Emilie [Goudstikker].”); S. REP. NO. 114-394, at 2 (2016).

<sup>21</sup> *Id.*

<sup>22</sup> S. REP. NO. 114-394, at 2 (2016).

<sup>23</sup> Therese O’Donnell, *supra* note 3.

For decades thereafter, Holocaust victims rebuilt their broken lives while public attention drifted,<sup>24</sup> and families whose property the Nazis stole:

[L]acked the information, resources, and sometimes wherewithal to locate and pursue litigation to obtain their property. Even for those with the resources, determining the provenance of Nazi-looted art proved to be extremely difficult since many changes of ownership went undocumented, and many of the transactions took place on the black market.<sup>25</sup>

Beginning in the 1990s, and led by the children, grandchildren, and other ancestors of Holocaust victims, efforts to recover Nazi-looted art resumed. But potential claimants faced enormous legal and practical obstacles in their recovery efforts some of which remain.<sup>26</sup> Nonetheless, encouraged by the Washington Principles on Nazi-Confiscated Art, non-binding principles to resolve disputes over confiscated artworks,<sup>27</sup> some European countries opened their archives and declassified World War II-era records<sup>28</sup> while new electronic registries and databases made it easier to locate stolen and disputed artworks.<sup>29</sup>

Looting victims, their heirs, journalists, and enterprising lawyers dug through these new records.<sup>30</sup> What they found enabled victims and their heirs to bring restitution, replevin,<sup>31</sup> and conversion cases,<sup>32</sup> and in approximately 250 instances resolve disputes through negotiations, mediations, and arbitrations.<sup>33</sup> But other potential claimants remained stymied because of lost and destroyed documents, false and incomplete records, black-market trafficking, and legal, financial, and practical difficulties getting their claims and/or court cases adjudicated<sup>34</sup> including forbiddingly strict state SOLs.<sup>35</sup>

In late 2016, Congress preempted these forbidding state SOLs through the HEAR Act with a six-year federal statute that only starts to run with the

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<sup>24</sup> Julia Edwards, "Monuments Men" veteran predicts more Nazi-seized art will surface, REUTERS (Nov. 21, 2013), <https://www.reuters.com/article/germany-art-monumentsmen/monuments-men-veteran-predicts-more-nazi-seized-art-will-surface-idINDEE9AK0D520131121>.

<sup>25</sup> S. REP. NO. 114-394, at 3 (2016).

<sup>26</sup> SIMON GOODMAN, *THE ORPHEUS CLOCK: THE SEARCH FOR MY FAMILY'S ART TREASURES STOLEN BY THE NAZIS*, 15 (2015). (The author of this article represented Mr. Goodman in a confidential mediation involving a valuable artwork looted from his family).

<sup>27</sup> Off. of the Special Envoy for Holocaust Issues, *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art>.

<sup>28</sup> Jennifer Kreder, *supra* note 10 at 98.

<sup>29</sup> Katharine Skinner, *Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. L. 673, 677 (2013).

<sup>30</sup> See generally, LYNN H. NICHOLAS, *supra* note 10.

<sup>31</sup> A replevin claim seeks return of stolen property.

<sup>32</sup> A conversion claim seeks damages.

<sup>33</sup> Herrick Feinstein LLP, Resolved Stolen Art Claims, [Herrick.com/content/uploads/2016/01/Resolved-Stolen-Art-Claims.pdf](http://Herrick.com/content/uploads/2016/01/Resolved-Stolen-Art-Claims.pdf), 2015.

<sup>34</sup> Jennifer Kreder, *supra* note 10 at 75, 75-6, 83, 97-8, 100-01, 110, 115, 117 and 127.

<sup>35</sup> S. REP. NO. 114-394, at 5, n.23 (2016).

discovery of a potential claim.<sup>36</sup> Additionally, in recent years, American courts have increasingly asserted jurisdiction over cases even those involving artworks outside the United States.<sup>37</sup> And in 2022 the Supreme Court required the application of American substantive law, which is far more favorable to claimants than laws in Spain in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, a case involving a Camille Pissarro painting on display in a Spanish museum.<sup>38</sup> This and other recent court disposessions are positive developments.

## II. HOW NAZI-LOOTED ART CASES ADVANCE TRANSITIONAL JUSTICE

Besides potentially offering direct redress, Nazi-looted art cases give context and perspective to horrific events by detailing, humanizing, and building captivating personalized historical narratives that memorably document Holocaust atrocities.

Much like Anne Frank's DIARY OF A YOUNG GIRL, Elie Wiesel's biographical novel NIGHT, and Steven Spielberg's film SCHINDLER'S LIST,<sup>39</sup> fact-based accounts developed in litigation capture public imagination, humanize parties, educate, enlighten, and dispel falsehoods more than grim

<sup>36</sup> S. 2763, 114<sup>th</sup> Cong. § 6 (2016); H.R. 6130, 114<sup>th</sup> Cong. (2016). Senators Charles Schumer (D-NY), Richard Blumenthal (D-Conn.), Ted Cruz (R-TX) and John Cornyn (R-TX) sponsored the HEAR Act.

<sup>37</sup> See, e.g., Nina Siegel, *Are the Dutch Lagging in Efforts to Return Art Looted by the Nazis?* N.Y. TIMES (May 12, 2017) <https://www.nytimes.com/2017/05/12/arts/design/are-the-dutch-lagging-in-efforts-to-return-art-looted-by-the-nazis.html> (“the country’s recent restitution efforts are coming under scrutiny as some international critics say Dutch policies for returning looted art have become stricter once again”); NINA SIEGEL, *Owner Withdraws Nazi-Looted Painting from Auction in Austria*, N.Y. TIMES (April 26, 2017), <https://www.nytimes.com/2017/04/26/arts/design/owner-withdraws-nazi-looted-painting-from-auction-in-austria.html> (“Anne Webber, founder, and co-chairwoman of the Commission for Looted Art in Europe. . . said that Austria was one of several countries in continental Europe, including Germany and Italy, where buyers get legal ownership at the point of sale even if the work is known to have been looted. The effect of the law, she said, is that someone can sell works at auction that have never been restored to their rightful owners, who do not have recourse to block the sale.”) Catherine Hickley, *German Art Collectors Face a Painful Past: Do I Own Nazi Loot?* N.Y. TIMES, (Mar. 14, 2017), <https://www.nytimes.com/2017/03/14/arts/design/german-art-collectors-face-a-painful-past-do-i-own-nazi-loot.html> (“Given German law, the heirs of the original Jewish owners must rely on the good will of private collectors. While museums are “honor” bound by the international Washington Principles – which require them to reach “just and fair solutions” with the heirs they have identify Nazi-looted art in their possession – those principles do not apply to corporate collections or private individuals.”); Doreen Carvajal & Alison Smale, *Nazi Art Loot Returned to . . . Nazis*, N.Y. TIMES (July 15, 2016), <https://www.nytimes.com/2016/07/16/arts/design/nazi-art-loot-returned-to-nazis.html> (“Years after World War II, American officials here entrusted more than 10,000 confiscated artworks to Bavarian authorities to return to the rightful owners, many of them Jews whose property had been plundered. But new research in the yellowing archives makes clear how relentlessly Nazi families pursued the Bavarian officials, badgering them, often successfully, to return art they brazenly continued to view as their property.”); Debbie Maimon, *New Polish Law Blocks Holocaust Survivors from Reclaiming Stolen Property*, YATED NE’EMAN (Oct. 25, 2017), <https://yated.com/new-polish-law-blocks-holocaust-survivors-reclaiming-stolen-property> (“A new Polish restitution bill effectively disqualifies all Holocaust survivors living outside of Poland and the vast majority of their heirs from making claims to recover property stolen by the Nazis.”).

S. 2763, 114<sup>th</sup> Cong. § 6 (2016); H.R. 6130, 114<sup>th</sup> Cong. (2016).

<sup>38</sup> *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022).

<sup>39</sup> Much the same, at the Nuremberg trials prosecution, Thomas Dodd, an American prosecutor, effectively used a single deboned skull of a Holocaust inmate that a prison commandant kept as a paperweight to illustrate the mass murder of millions of Jews.



statistics. Specifically, these cases tell the story of the theft and re-distribution of Jewish property as part of the dehumanization of Jews that led to mass murder. History matters. And these cases provide vivid and detailed accounts of this history.

Explaining the importance of written histories generally, Nobel prize winner Isaac Bashevis Singer wrote: “[w]hen a day passes, it is no longer there. What remains of it? Nothing more than a story. If stories weren't told or books weren't written, man would live like the beasts, only for the day.”<sup>40</sup>

Singer is right. Absent authoritative writings, chunks of history risk being distorted, forgotten, and effectively erased from public consciousness. When this happens, the consequences could be dire. With less than complete historical accounts, unscrupulous partisans can re-write the past to perniciously distort future understanding.

But true-life narratives call out and expose such gross historical lies. By analogy, the Nazis concealed their death camps at Auschwitz, Treblinka, Belzec, Buchenwald, and elsewhere. But the Allies found the Nazis' death camps. And they filmed their gruesome gas chambers and killing fields to publicize Nazi crimes and ensure those horrors were not diminished, denied, or forgotten.

Nazi-looted art cases serve comparable purposes. Before World War I, the Turks murdered more than a million Armenians living in the Ottoman Empire.<sup>41</sup> Yet, less than twenty-five years later, on the eve of the Nazi invasion of Poland, Hitler asked: “Who, after all, speaks today of the annihilation of the Armenians?”<sup>42</sup> The implication: history can forget Nazi victims too. There is a basis for such cynicism when history is not preserved. As President Harry S. Truman reminded the world after the Allies defeated the Nazis that it “is easier to remove tyrants and destroy concentration camps than to kill the ideas that gave them birth and strength.”<sup>43</sup>

We live in an ahistorical Orwellian world dominated by spin, “fake news,” propaganda, false narratives, suppression of “inconvenient truths” and even outright denials of reality. Better than any other modern writer, George Orwell called attention to such misuse of language and abuse of power in modern times most potently through the illiberal misuse of Leviathan-like governmental power.

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<sup>40</sup> ISSAC BASHEVIS SINGER, *NAFTALI THE STORYTELLER AND HIS HORSE, SUS AND OTHER STORIES* (1973).

<sup>41</sup> See, e.g., The Genocide Education Project, *Hitler and the Armenian Genocide*, <https://genocideeducation.org/background/hitler-and-the-armenian-genocide/>.

<sup>42</sup> *Id.*

<sup>43</sup> Harry S. Truman, President, U.S., Address to the United Nations Conference in San Francisco (April 25, 1945).

As Lord Acton noted, power corrupts and absolute power corrupts absolutely.<sup>44</sup> Echoing this, in 1984 Orwell wrote: “We know that no one ever seizes power with the intention of ever relinquishing it. Power is not a means: it is an end.”<sup>45</sup> In the essay *Looking Back on the Spanish War*,<sup>46</sup> he described his experience fighting for the Republican side against the Fascists during the Spanish Civil War. There, after the Stalinists brutally crushed their “allies” to conceal their crimes, Orwell’s “progressive” editors at *The New Statesman* refused to print his first-hand accounts of what he saw.<sup>47</sup> Criticizing this censorship of his eye-witness reportage, Orwell presciently later wrote:

It will never be possible to get a completely accurate and unbiased account of the Barcelona fighting, because the necessary records do not exist. Future historians will have nothing to go upon except a mass of accusations and party propaganda. I myself have little data beyond what I was with my own eyes and what I have learned from other eyewitnesses whom I believe to be reliable...This kind of thing is frightening to me, because it often gives me the feeling that the very concept of objective truth is fading out of the world. After all, the chances are that those lies, or at any rate similar lies, will pass into history.<sup>48</sup>

Like Orwell, G.K. Chesterton foresaw the modern suppression of truth when he predicted that in the future battles will be fought over reality. “Fires will be kindled to testify that two and two make four,” he said. “Swords will be drawn to prove that leaves are green in summer. . .”<sup>49</sup>At a time of Holocaust minimization and even denialism, such fires need rekindling. And litigation remains a means of rekindling.

Though imperfect, court cases enhance truth-finding by transparently emphasizing compellingly specific true-life stories that uncover, detail, and document facts juxtaposed in compelling ways and subjected to rigorous scrutiny. By memorializing Nazi atrocities, court cases embed and spread knowledge, becoming prophylactic guardrails and bulwarks against false accounts that devalue the dignity of Holocaust victims, rationalize Nazi crimes, and increase the likelihood of future horrific crimes against humanity.

The heirs of looting victims were able to sustain these cases because, often with outside help, they could marshal vast resources to litigate them. But

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<sup>44</sup> See, Anton Institute, *Lord Acton Quote Archive*, ACTON INST., <https://www.acton.org/research/lord-acton-quote-archive>.

<sup>45</sup> GEORGE ORWELL, 1984, at 173 (1949).

<sup>46</sup> George Orwell, *Looking Back on the Spanish War* (1943) available at [https://orwell.ru/library/essays/Spanish\\_War/english/esw\\_1](https://orwell.ru/library/essays/Spanish_War/english/esw_1).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Sam Leith, *What does it mean when Giorgia Meloni quotes G.K. Chesterton?* THE SPECTATOR, Oct. 1, 2022.

this is only possible for a fraction of looting victims. As Elie Wiesel observed that the “duty to remember covers not only big accounts” including expensive art, but also small accounts of “merchants, cobblers, peddlers, schoolteachers, water carriers, beggars: the enemy deprived them of their pathetically poor possessions.”<sup>50</sup> True, the Nazis and their beneficiaries not only robbed wealthy Jews but also middle-class and poor Jews whose ancestors (even when ascertainable) could not feasibly litigate court cases. Moreover, some European countries remain unwilling to restore looted property of either great or small objective value.<sup>51</sup> For the ancestors of all these victims, transitional justice, though imperfect, is the only attainable form of justice.

Although only a fraction of possible actions can be litigated, cases that often emblematically emphasize common atrocities and highlight shared suffering, commemorate communal experiences, connect dots, add to an incomplete historical record, further understanding, and rebut propaganda and other false narratives. And every case offers opportunities for redress and accountability based on particular and common events.

Successful cases can also partly restore pieces of lost cultural history. Noting this, Helen Mirren, who portrayed Maria Altmann, in the film *Woman in Gold*, testified before the Senate in 2016 in support of the passage of the HEAR Act by pointing out that art reflects memories that are shared across familial and cultural lines. She testified that: “When the Jewish people were dispossessed of their art, they lost some of their heritage. Memories were taken along with the art, and to have no memories is like having no family, and that is why art restitution is so imperative.”<sup>52</sup>

### III. REASONS WHY AMERICAN COURTS ARE UNIQUELY QUALIFIED TO ADJUDICATE NAZI-LOOTED ART CASES

The United States is not just the best place for litigation: it is the only nation where such litigation is even possible on more than a token basis if at all. There are good reasons for this. To start with, because of the HEAR ACT, the United States is alone in having a preempted SOL Act that allows claimants to pursue cases based on acts committed decades ago. Given the

<sup>50</sup>STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR AND THE UNFINISHED BUSINESS OF WORLD WAR II at XI (2003).

<sup>51</sup> See generally, Mark Labaton, *Recovering Nazi-Looted Art*, LOS ANGELES LAWYER MAGAZINE, pp. 34–41 (Jun. 2018) (particularly discussions of *Von Saher, de Csepel and Philip cases*; see also, e.g., *Phillip v. Germany* 141 S.Ct. 703, (2021); Johanna Plucinska, Dan Fastenberg, *75 Years on, Holocaust survivors struggle to recover property in Poland*, REUTERS, (Jan. 20, 2020); Jo Harper, *Nationalized Jewish property: Warsaw’s restitution problem*, DW (Jan. 27, 2020). Poland was one of 47 countries to sign the Terezin Declaration on Holocaust Era Assets and Related Issues, but the country has never followed up with legal regulations. Few believe US pressure will alter the situation; Max Minckier & Sylwia Mitura, *Roadblocks to Jewish Restitution: Poland’s Unsettled Property*, HUMANITY IN ACTION, POLSKA at [https://humanityinaction.org/knowledge\\_detail/roadblocks-to-jewish-restitution-polands-unsettled-property/](https://humanityinaction.org/knowledge_detail/roadblocks-to-jewish-restitution-polands-unsettled-property/).

<sup>52</sup> *Hearing Before the Subcomm. on the Constitution & Subcomm. On Oversight, Agency Action, Federal Rights and Federal Courts Comm. on the Judiciary*, US Senate (Jun. 7, 2016) (testimony of Dame Helen Mirren).

sunsetting of the HEAR Act in November 2036, though, the time to bring is limited. Squandering opportunities to bring worthy lawsuits in the meantime would be tragic.

Moreover, America's civil justice system uniquely enables litigants to bring tough cases that affect social and political policy. No other nation has a justice system, substantive and procedural law, and legal tradition that makes such cases feasible or even possible. As Yale Law School Professor Owen Fiss explained in his law review article entitled *Against Settlement*, litigation in America is beneficial in ways litigation abroad or alternative dispute resolution never can be.<sup>53</sup>

Just as they have done in settling great political and social issues, distinct features of the American civil justice system make American courts particularly well-suited to adjudicate Nazi-looted art cases. For example, the American legal system gives middle-class civil litigants incomparable access to courts, including the ability to pursue civil lawsuits contingently and without requiring litigants to post expensive bonds or pay prevailing parties' legal fees thereby eliminating chilling risks.<sup>54</sup>

Claimants seeking to recover Nazi-looted art in the United States benefit from the HEAR Act's SOL provisions, which make such litigation possible many decades after the Holocaust. Claimants also enjoy the advantage of substantive law in most American jurisdictions providing that one who purchases stolen art even innocently and all subsequent purchasers of such property acquire no legal title. The title remains with the true owner', while in most European countries an "innocent" purchaser is presumed to be the owner.<sup>55</sup> This difference in law substantially reduces the litigation burdens and risks placed on claimants in expensive high-stakes litigation.

The American civil justice system also gives litigants unmatched opportunities through civil document discovery and depositions to elicit facts, develop narratives, and generate transparent precedents based on a deliberative, adversarial process that affords both sides incomparable procedural and substantive rights –including the right to cross-examine adverse witnesses, the classic "engine" of truth that adds gravitas to most court dispositions.<sup>56</sup>

Federal and state rules of civil procedure afford litigants broad-ranging opportunities to discover, and document facts through document requests and interrogatories and depose under oath parties and non-parties including experts.<sup>57</sup> Such mechanisms are invaluable tools to find, develop, and test

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<sup>53</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

<sup>54</sup> This is known as the American Rule.

<sup>55</sup> See, e.g., *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S.Ct. 1502 (2022). See also, e.g., Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633–34 (2000).

<sup>56</sup> *Id.*

<sup>57</sup> See generally, Fed. R. Civ. P.

facts, expose new information, reconstruct events in powerful narrative forms, create compelling narrative storylines, and shape history.

While rigorous, expensive, and time-consuming, American-style litigation aims at finding truth and dispensing justice and spreading and enhancing human knowledge. Although no legal system is perfect, ours is far better at achieving its noble aims with greater depth, perspective, and reliability than other systems and our system allows for a more accurate and complete record of events than mainstream or social media. The legal system is deliberative and in eliciting truth and countering falsehoods, our civil justice system is far less a product of bias, prejudice, partisanship, fear, and favor.

Hannah Arendt, known for her articles and books about war crimes noted in 1971 that tyrants rely upon “big lies” to pervert history and exercise their wills because:

Lies are often much more plausible, more appealing to reason, than reality, since the liar has the great advantage of knowing beforehand what the audience wishes or expects to hear . . . Facts need testimony to be remembered and trustworthy witnesses to find a secure dwelling place in the domain of human affairs.<sup>58</sup>

American courtrooms are such a dwelling place. There, litigants have unparalleled access to source documents, and witnesses are subject to cross-examination. Additionally, to be usable, evidence must satisfy strict standards of admissibility, and claims must then be proven.<sup>59</sup> Facts verifiable through this rigorous crucible become trustworthy “stubborn things” because whatever one’s inclinations or passions “they cannot alter the states of facts and evidence.”<sup>60</sup> Listening to witnesses and reviewing admissible documentary evidence makes “one a witness” too.<sup>61</sup>

Parties carefully craft arguments based on facts and rules, not mere conjecture, opinion, and overt bias. Court narratives often become potent and lasting, adding perspective, specificity, context, clarity, and meaning to underlying events. Detailed, accurate, colorful, and captivating fact-based proceedings, decisions, and verdicts engage, create empathy, enhance understanding, shed noxious lies, and empower, shaping policy, behavior, and history. Although not often necessary litigants’ explicit purpose, their cases can broaden public knowledge and understanding and sometimes even leave

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<sup>58</sup> HANNAH ARENDT, *Lying in Politics*, in *CRISES OF THE REPUBLIC* (1971).

<sup>59</sup> See, e.g., Fed. R. Civ. P.

<sup>60</sup> The quote is from John Adams in defending British soldiers accused – and acquitted – of murder because of what has been called the “Boston Massacre.” See *Founders Online*, NAT’L HIST. PUBL’N, <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016>.

<sup>61</sup> ARIEL BURGER, *WITNESS: LESSONS FROM ELIE WIESEL’S CLASSROOM 1* (2018) (quoting Wiesel).

behind – as the cases discussed next have done – powerful and enduring specific historical accounts.

#### IV. EXEMPLARY CASES

Below are summaries of exemplary Nazi-looted art cases that illustrate the value of litigation. Step by step they trace the incrementally abusive policies directed at Jews preceding the implementation of the Final Solution, which included the theft of businesses and other property (*Altmann, Bondi, Cassirer, Reif, Von Saher*); the deprivation of Jew's citizenship rights in Germany and other countries controlled by the Third Reich (e.g., *Altmann, Bondi, Cassirer, Reif, Von Saher*); and the planned extermination of European Jews. (e.g., *Reif, Guttman*). The cases enhance and give permanency to individual accounts – with universal appeal. They add to public understanding and discredit Holocaust-related false information and propaganda.

##### A. GUTMANN/GOODMAN AND MENZEL LITIGATION

Pa had fought a bitter and often unsuccessful battle to recover the priceless artworks that had been stolen from his family – stolen first by the Nazis, and then, in effect stolen again by narrow-minded bureaucrats. Unscrupulous art dealers and willfully negligent auction houses, as well as museum directors and wealthy collectors, would all be a party to this theft long after the war [World War II].<sup>62</sup>

So wrote Simon Goodman describing his quest to recover dozens of master artworks that the Nazis stole from his grandparents before murdering them.<sup>63</sup> Since retiring as a Los Angeles record company executive three decades ago, Goodman recovered or received compensation for Degas, Cranach, Renoir, Botticelli and other prize paintings stolen from his grandparents along with other valuable artifacts, including an engraved Orpheus table clock from the 1500s depicting scenes from the mythical underworld.<sup>64</sup>

Goodman (an Anglicized version of Guttman) was an early descendant of Holocaust victims who sought to recover looted familial art.<sup>65</sup> Goodman's grandfather, Fritz Gutmann, owned the Bank of Dresden and was president of the Wannsee Country Club in the shadow of the home where the Nazis planned the Final Solution.<sup>66</sup>

<sup>62</sup> SIMON GOODMAN, *THE ORPHEUS CLOCK: THE SEARCH FOR MY FAMILY'S ART TREASURES STOLEN BY THE NAZIS*, 15 (2015). (Several years ago, the author of this article represented Mr. Goodman in a confidential mediation involving a valuable artwork looted from his family).

<sup>63</sup> *Id.* at 23–27.

<sup>64</sup> GOODMAN, *THE ORPHEUS CLOCK: THE SEARCH FOR MY FAMILY'S ART TREASURES STOLEN BY THE NAZIS* (2015) at 323–33.

<sup>65</sup> See *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

<sup>66</sup> GOODMAN, *supra* note 64. The author of this article successfully represented Mr. Goodman in a confidential, complex, multiparty mediation involving a paying valued at more than \$10 million.

In *The Orpheus Clock*, Goodman described his efforts to recover a portion of the artwork his grandfather owned.<sup>67</sup> Those efforts included a 1997 lawsuit to recover an Edgar Degas painting entitled “Landscape with Smokestacks” possessed by Daniel Searle, heir to the Searle pharmaceutical fortune, a case settled on the eve of trial.<sup>68</sup>

Two years earlier, Goodman saw a description of this Degas painting in an art catalog, which listed it as belonging to Searle. The Nazis confiscated the painting in 1939 in Paris, where the Gutmann’s sent it from a home they had in the Netherlands.<sup>69</sup> It changed hands several times after the war, moving through Switzerland to New York, where Mr. Seale, unaware of its history, purchased the painting in 1987 for \$850,000.<sup>70</sup>

The settlement required Seale to donate the painting to the Chicago Art Institute denoting that the donation was a joint one from the Seale family and from Simon Goodman, Nick Goodman (Simon’s brother), and Lili Gutmann, (Fritz’s sister), family members who together received an undisclosed amount from the Searles representing half the appraised value of the painting.<sup>71</sup> It also required that the names of Friedrich and Louise Gutmann, who died in concentration camps, accompany Seale’s, and be listed on the Institute’s walls whenever the work was on display.<sup>72</sup>

Publicity from this case prompted 44 nations to adopt the Washington Principles on Nazi-Confiscated Art<sup>73</sup> and encouraged other families – including the Altmann family – to assert familial claims.<sup>74</sup> Along with Helen Mirren, who portrayed Ms. Altmann in a film about that family’s case, Goodman testified before the Senate to promote the HEAR Act, which led to the generous federal SOL that made it possible to litigate dozens of these cases in the United States.<sup>75</sup>

Earlier still, in the 1960s, the Menzel family successfully sued in New York to recover a Marc Chagall painting, called *L'Echelle de Jacob* or *Le Paysan et l'Echelle* or *The Peasant and the Ladder* or *Jacob's Ladder*, sold under duress and characterized in a restitution action by the New York Supreme Court as akin to an armed holdup.<sup>76</sup> The painting was part of the Menzel art collection that the Nazis seized from the Menzels’ apartment in Brussels in 1941 after that Jewish family fled the Nazis.<sup>77</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 232–33.

<sup>74</sup> *Washington Conference Principles on Nazi-Confiscated Art*, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> (last visited Mar. 28, 2023).

<sup>75</sup> The undersigned author of this article represented Goodman in a mediation involving one such valuable painting that sold at auction.

<sup>76</sup> *Menzel v. List*, 49 Misc.2d 300, 305 (1966).

<sup>77</sup> *Id.*

Erna Menzel first located the painting in an art catalog in 1962. She contacted the listed collector, Albert A. List, and informed him that the artwork had been seized by the Nazis from her collection and requested its return.<sup>78</sup> List, who said he had bought the painting from Perls Galleries in New York in 1955 and was unaware of its history, refused to return it.<sup>79</sup> In 1966, she obtained a favorable trial court ruling on her restitution claim and recovered the Chagall painting from List.<sup>80</sup>

*B. MARIA ALTMANN V. REPUBLIC OF AUSTRIA LITIGATION*

In 2000, Maria Altmann (nee Maria Bloch-Bauer) brought her epic case against Austria.<sup>81</sup> Seven years later, she recovered five Gustav Klimt paintings in Austria's possession, which the Nazis stole from her deceased uncle Ferdinand Bloch-Bauer, a Viennese and Czechoslovakian businessman.<sup>82</sup> The Klimt paintings included a portrait of Altmann's aunt, Adele, known as Austria's *Mona Lisa*.<sup>83</sup>

Altmann sued after Austria refused to negotiate with her.<sup>84</sup> Then a widow in her eighties, she made ends meet by selling women's clothing from her home.<sup>85</sup> She could not afford to sue in Austria, which required a pre-filing litigation bond of several hundred thousand dollars.<sup>86</sup> Represented contingently, she sued in Los Angeles, which required no bond.<sup>87</sup> A blockbuster film, starring Helen Mirren as Altmann, chronicled Altmann's journey.<sup>88</sup> Randol Schoenberg, the grandson of Arnold Schoenberg, the world-famous composer who fled Austria to avoid Nazi persecution, represented her.

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*; GOODMAN, *supra* note 64, at 15.

<sup>81</sup> *Altmann*, 541 U.S. 677.

<sup>82</sup> *Id.*; Sharon Waxman, *A Homecoming in Los Angeles for Five Klimts Looted by the Nazis*, N.Y. TIMES, (Apr. 6, 2006), <https://www.nytimes.com/2006/04/06/arts/design/a-homecoming-in-los-angeles-for-five-klimts-looted-by-nazis.html>.

<sup>83</sup> Anne-Marie O'Connor, *Maria Altmann dies at 94; won fight for return of Klimt portrait seized by Nazis*, L.A. TIMES, (Feb. 8, 2011), <https://www.latimes.com/local/obituaries/la-xpm-2011-feb-08-la-me-maria-altmann-20110208-story.html>.

<sup>84</sup> *See, e.g.*, Waxman, *supra* note 84; William Grimes, *Maria Altmann, Pursuer of Family's Stolen Paintings, Dies at 94*, N.Y. TIMES, (Feb. 9, 2011), <https://www.nytimes.com/2011/02/09/arts/design/09altmann.html>.

<sup>85</sup> *See* Grimes, *supra* note 86.

<sup>86</sup> *Id.*

<sup>87</sup> *Altmann*, 142 F.Supp.2d 1187. On a contingent basis, she retained Randol Schoenberg, the grandson of a close friend and of the emigrant composer Arnold Schoenberg to represent her.

<sup>88</sup> THE WOMAN IN GOLD (BBC Films 2015).



The backstory for this case began in March 1938 when Germany and Austria united.<sup>89</sup> Greeted enthusiastically, Hitler arrived in Vienna.<sup>90</sup> Non-Jewish Austrians like their German compatriots embraced the Nazis' Aryanization program coupled with their confiscation and redistributionist practices, which enabled non-Jewish Austrians with Nazi help to effectively steal the homes, businesses, bank accounts, securities, and other property of Jewish neighbors.<sup>91</sup>

Being a critic of the Nazis, Bloch-Bauer fled to Czechoslovakia and then Switzerland,<sup>92</sup> where he died in 1945 which was 13 years after the death of his wife Adele.<sup>93</sup>

The Nazis, Austrians, and Swiss stole his possessions, including his sugar beet factories, his artwork, his Prague castle, and much of his liquid wealth.<sup>94</sup>

Reinhard Heydrich, the Nazi dictator of Bohemia and Moravia (now part of Germany and the Czech Republic), and the architect of the Final Solution expropriated Bloch-Bauer's castle to use as his headquarters.<sup>95</sup> Czech freedom fighters assassinated Heydrich there.<sup>96</sup> Hitler and Goering divided up much of Bloch-Bauer's remaining property,<sup>97</sup> while the Swiss government confiscated his bank funds and securities – approximately \$21 million of which Altmann recovered before she died in 2011 as part of a class action settlement.<sup>98</sup>

Years earlier in Vienna, she married opera star Fritz Altmann.<sup>99</sup> As a wedding present, her uncle Ferdinand gave her the diamond necklace Adele posed wearing for the “Woman in Gold” painting.<sup>100</sup> Later, the Altmanns fled

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<sup>89</sup> The annexation of Austria by the Third Reich in March 1938 has been referred to as the Anschluss. Following the resignation of the Austrian Chancellor Kurt von Schuschnigg on March 11, the next day, March 12, 1938, Hitler accompanied German troops into Austria, “where enthusiastic crowds met them.” *Germany annexes Austria*, HISTORY, (Feb. 9, 2010), <https://www.history.com/this-day-in-history/germany-annexes-austria>; Tony Paterson, *Anschluss and Austria's Guilty Conscience: Seventy Years After the Nazis' Annexation of Austria, Questions Remain Over Whether its Citizens Were Victims or Accomplices*, INDEPENDENT, (Mar. 13, 2008), <https://www.independent.co.uk/news/world/europe/anschluss-and-austria-s-guilty-conscience-795016.html>; *Anschluss*, BRITANNICA.COM, <https://www.britannica.com/event/Anschluss>; Steven Erlanger, *Vienna Skewered as a Nazi-Era Pillager of Its Jews*, N.Y. TIMES, (Mar. 7, 2002), <https://www.nytimes.com/2002/03/07/world/vienna-skewered-as-a-nazi-era-pillager-of-its-jews.html>.

<sup>90</sup> See Erlanger, *supra* note 91.

<sup>91</sup> *Id.*

<sup>92</sup> *Altmann*, 142 F.Supp.2d 1187.

<sup>93</sup> Peter Schjeldahl, *Golden Girl: The Neue Galerie's New Klimt*, THE NEW YORKER, (July 16, 2006), <https://www.newyorker.com/magazine/2006/07/24/golden-girl-2>; Anne-Marie O'Connor, *Fighting for Her Past*, LOS ANGELES TIMES, (Mar. 20, 2001), <https://www.latimes.com/archives/la-xpm-2001-mar-20-me-40191-story.html>.

<sup>94</sup> See O'Connor, *supra* note 95.

<sup>95</sup> *Reinhard Heydrich: In Depth*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/reinhard-heydrich-in-depth>. Months before his assassination by Czech freedom fighters in June 1942, Heydrich mastermind “The Final Solution,” the planned, systematic extermination of the Jews at the Wannse Conference outside Berlin.

<sup>96</sup> *Id.*

<sup>97</sup> See O'CONNOR, *supra* note 95.

<sup>98</sup> See Grimes, *supra* note 85.

<sup>99</sup> *Id.*; see also O'Connor, *supra* note 95.

<sup>100</sup> Alix Kirsta, *Glittering Prize*, THE TELEGRAPH, (July 10, 2006), <https://www.telegraph.co.uk/culture/art/3653726/Glittering-prize.html>.

Austria but not before the Gestapo confiscated that necklace, which Bloch-Bauer had previously given as a wedding gift to his niece Maria Altmann.<sup>101</sup> Goering would later give that stolen diamond necklace to his wife.<sup>102</sup>

To extort money from Fritz's brother, Bernhard, the Nazis imprisoned Fritz.<sup>103</sup> Bernhard had fled Nazi persecution by moving his cashmere sweater factory to Liverpool, England, and before leaving Austria secretly wired his receivables there.<sup>104</sup> After Bernhard paid the ransom, the Nazis released Fritz but placed him and Maria under house arrest.<sup>105</sup> Following three failed attempts, the Altmann's escaped through a back door during a dental visit.<sup>106</sup>

With help, they then flew to Cologne, Germany,<sup>107</sup> making "their way to the Dutch border, where, on a moonless night, a local farmer guided them across a brook, under barbed wire, and into Holland."<sup>108</sup> From there, they emigrated to San Diego and later moved to Los Angeles,<sup>109</sup> where Fritz took up work as an engineer in the defense industry.

In 1998 (four years after Fritz passed away),<sup>110</sup> facing pressure from a resurgent Green Party<sup>111</sup> Austria opened its archives.<sup>112</sup> Responding to press inquiries, an Austrian cabinet minister denied Austria possessed Nazi-looted art.<sup>113</sup> Suspecting that his representation was false, Austrian journalist Hubertus Czernin dug through Austrian archives and discovered the Bloch-Bauer Klimt paintings on display in Austria's Belvedere Palace had *not* been donated to Austria by the Bloch-Bauers as Austria represented.<sup>114</sup> Czernin gave Altmann this evidence, leading to her lawsuit.<sup>115</sup>

Austria contested jurisdiction based on the Foreign Sovereign Immunities Act ("FSIA").<sup>116</sup> The dispute wound through the courts before the Supreme Court held that a narrow exemption to FSIA potentially allowed for American jurisdiction though in limited circumstances.<sup>117</sup>

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<sup>101</sup> See Grimes, *supra* note 85; see also O'Connor, *supra* note 95.

<sup>102</sup> See Kirsta, *supra* note 102.

<sup>103</sup> See Grimes, *supra* note 85.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See Grimes, *supra* note 85.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Elisabeth Penz & Jon Thurber, *Hubertus Czernin, 50, Austrian Journalist Had Role in Return of Art Seized by Nazis*, LA TIMES (June 15, 2006), <https://www.latimes.com/archives/la-xpm-2006-jun-15-me-czernin15-story.html>; NEW YORKER, *Letter from Europe* (June 16, 2006), <https://www.newyorker.com/magazine/letter-from-europe>.

<sup>112</sup> See Waxman, *supra* note 83.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See *Republic of Austria*, *supra* note 66.

The parties then agreed to arbitrate and settled their dispute.<sup>118</sup> Altmann sold the recovered Klimt paintings for \$325 million.<sup>119</sup> She shared those proceeds with her family, paid contingent lawyer fees, and made donations to the Los Angeles Holocaust Museum.<sup>120</sup>

Other families soon brought their own lawsuits. Most, though, were stymied by restrictive state SOLs, which the HEAR Act sought to remedy.<sup>121</sup> It preempts restrictive statutes with a uniform federal six-year statute triggered only when a claimant learns of a claim.<sup>122</sup>

Congress passed that legislation after concluding that the “unique and horrific circumstances of World War II and the Holocaust” made such SOLs too burdensome for claimants.<sup>123</sup> Enacted in December 2016, the Act expires in December 2026.<sup>124</sup>

### C. UNITED STATES EX. REL. PORTRAIT OF WALLY

Lea Bondi, a Viennese art gallery proprietor, owned *Portrait of Wally*, an Egon Schiele painting of his lover Wally Neuzil,<sup>125</sup> which became the object of a dramatic, highly publicized lawsuit brought by the Department of Justice and later a documentary film.<sup>126</sup>

Forced under duress to sell her art gallery pursuant to Austrian’s Aryanization program, Bondi agreed to sell her gallery to Frederick Welz, a Nazi, for \$5,441 (today \$91,245).<sup>127</sup> But even that was insufficient for Welz.<sup>128</sup> Fearing further persecution, Bondi and her husband, Alexander Sandor, left Austria.<sup>129</sup>

On the eve of their departure to London, Welz demanded that Bondi also give him *Wally*,<sup>130</sup> which was not part of Bondi’s gallery.<sup>131</sup> But scared she

<sup>118</sup> Patricia Cohen, *The Story Behind ‘Woman in Gold’: Nazi Art Thieves and One Painting’s Return*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html>.

<sup>119</sup> *Id.*; see also *Republic of Austria*, *supra* note 66; see also Waxman, *supra* note 83; See Grimes, *supra* note 85 (Austria had negotiated the right to purchase the artwork but then declined to do so).

<sup>120</sup> See Grimes, *supra* note 85 (“With money provided by the businessman and philanthropist Ronald S. Lauder, the Neue Galerie in Manhattan bought the earlier portrait of Adele for \$135 million. At the time, it was the largest sum ever paid for a painting. The four other paintings were auctioned by Christie’s for \$192.7 million and went into private collections.”).

<sup>121</sup> S. 2763, 114<sup>th</sup> Cong. (2016), *supra* note 37; H.R. 6130, 114<sup>th</sup> Cong. (2016), *supra* note 37.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *United States v. Portrait of Wally*, 663 F.Supp.2d 232 (S.D.N.Y. 2009).

<sup>126</sup> *Id.* at 238.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Judith H. Dobryzynski, “*The Zealous Collector—A Singular Passion for Amassing Art, One Way or Another*,” N.Y. TIMES, (Dec. 24, 1997), <https://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html> (Dobryzynski relied partly on documents from Jane Kallir, who obtained those records from Otto Kallir, a dealer in Schiele paintings who died in 1978, and whom Bondi had earlier asked for help); see also Jane Kallir, *Austrian*

and her husband might be harmed if she refused Welz's demand, Bondi gave him the painting.<sup>132</sup>

Her fear was justified. In 1938, Welz coerced Dr. Heinrich Reiger, a Jewish dentist, to give him two Schiele paintings.<sup>133</sup> Still, the Nazis sent Reiger and his wife to their deaths in the Theresienstadt concentration camp.<sup>134</sup>

After World War II, the United States imprisoned Welz for war crimes,<sup>135</sup> and shipped *Wally* to Austria.<sup>136</sup> But rather than return *Wally* to Bondi's family, Austria kept it.<sup>137</sup> Bondi, who died in 1969, tried for the rest of her life to recover *Wally*.<sup>138</sup> During her search, she contacted Dr. Rudolph Leopold.<sup>139</sup> Pretending to help her, he located and acquired *Wally* by secretly trading another Schiele painting in exchange for *Wally*.<sup>140</sup> He later donated *Wally* to his Leopold Museum in Vienna.<sup>141</sup>

Years later, while *Wally* was on loan to the MoMA in Manhattan, Judith H. Dobryzynski exposed Dr. Leopold's secret acquisitions of Nazi-looted art.<sup>142</sup> Her 1997 article in *The New York Times* prompted the Manhattan District Attorney's Office to seize *Wally* as the MoMA was about to return it to Austria.<sup>143</sup> Assisted by Bondi's family, the Department of Justice pursued a forfeiture action while retaining *Wally* pending the outcome of that lawsuit.<sup>144</sup> Dr. Leopold and the Leopold Museum then battled the Department of Justice,<sup>145</sup> assisted by Bondi's family, before the parties settled.<sup>146</sup> The result: the defendants paid the Bondis \$19 million (slightly more than the

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*Restitution Policy: Where Are We, and How Did We Get Here?* GALERIE ST. ETIENNE (Oct. 1, 2015), <https://gseart.com/gse-blog/2015/10/01/austrian-restitution-policy/>.

<sup>132</sup> See *Wally*, *supra* note 126 at 238.

<sup>133</sup> *Id.* at 238 (Dr. Reiger approached Welz to negotiate the sale of his art collection to finance his emigration from Austria. Welz acquired Schiele drawings and paintings from Dr. Reiger in 1939 or 1940, just two years before his death at Theresienstadt.).

<sup>134</sup> See *Wally*, *supra* note 126 at 238-39.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 239-41.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 245.

<sup>139</sup> See Dobryzynski, *supra* note 132.

<sup>140</sup> *Wally*, *supra* note 126 at 239-45.

<sup>141</sup> *Id.*

<sup>142</sup> See Dobryzynski, *supra* note 132.

<sup>143</sup> RALPH E. LERNER & JUDITH BRESLER, ART LAW Vol. 1, 761 (4th ed. 2012); *Wally*, *supra* note 126 at 246. (Robert Morgenthau, the head of that office then, was the grandson of Henry Morgenthau, who as U.S. Ambassador to the Ottoman Empire lobbied tirelessly, though futilely, for the U.S. government to intervene on behalf of the Armenians as they were being massacred by the Turks and subject to a genocide in 1914-15); ROBERT D. MCFADDEN, Robert Morgenthau, *Longtime Manhattan District Attorney, Dies at 99*, N.Y. TIMES, July 21, 2019.

<sup>144</sup> See *Wally*, *supra* note 126 at 246.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

value of the painting) to keep *Wally*,<sup>147</sup> and agreed to post signage whenever the painting was displayed telling its history.<sup>148</sup>

This settlement, in 2010, furthered multiple transitional justice purposes. The \$19 million compensated Bondi's heirs; the signage court pleadings and decisions leave an important historical record constituting a form of transitional justice.

#### D. CASSIRER V. THYSSEN-BORNEMISZA COLLECTION FOUNDATION

Claude Cassirer, a retired photographer, brought this action to recover a Camille Pissarro painting of a rain-swept Paris Street entitled "Rue Saint-Honoré, Après-Midi, Effet de Pluie."<sup>149</sup> Purchased in 1898, the painting remained in the Cassirer family for 40 years. It belonged to Claude Cassirer's grandparents Fritz and Lilly Cassirer, who fled Berlin in 1939 and gave the painting to the Gestapo in exchange for an exit visa to obtain safe passage to England.<sup>150</sup>

The Nazis appraised the painting – now valued at \$30 million – to be worth the equivalent of \$360. The family never received even that pittance as the Nazis placed those funds in a blocked account and auctioned the painting for an unrecorded amount.<sup>151</sup>

In 1976, Baron Hans Heinrich Thyssen-Bornemisza, a sophisticated art collector – whose uncle Fritz Thyssen, a German industrialist helped finance the Nazis' rise to power – brought the painting for \$275,000 (\$1.2 million today)<sup>152</sup> from the Stephen Hahn Gallery,<sup>153</sup> a New York gallery that trafficked in looted art.<sup>154</sup>

In 1993, Spain bought the TBC collection, which included the Pissarro painting, from the Baron for \$327 million and converted its Villahermosa Palace Madrid into the Thyssen-Bornemisza Museum.<sup>155</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 (9th Cir. 2009).

<sup>150</sup> *Cassirer v. Kingdom of Spain*, 616 F. 3d 1019, 1022-23 (9th Cir. 2010).

<sup>151</sup> *Id.*

<sup>152</sup> *Fritz Thyssen, German Industrialist*, ENCYCLOPEDIA BRITANNICA, Feb. 4, 2019, <https://www.britannica.com/biography/Fritz-Thyssen>.

<sup>153</sup> See TILL VERE-HODGE, *Cassirer v Thyssen-Bornemisza: California Court revives claim to Pissarro yet again*, ART@LAW, Sept. 28, 2017, <https://www.artatlaw.com/archives/archives-2017-jul-dec/cassirer-v-thyssen-bornemisza-california-court-revives-claim-pissarro-yet>.

<sup>154</sup> *Id.*

<sup>155</sup> *Cassirer v. Kingdom of Spain*, 616 F. 3d 1019, 1023 (9th Cir. 2010).

In 1999, Claude Cassirer, Fritz and Lilly's grandson, a Southern Californian photographer, learned that the painting was on display in the Thyssen-Bornemisza museum.<sup>156</sup>

After unsuccessfully petitioning for its return, he sued in Los Angeles to recover it.<sup>157</sup> Represented by a team of lawyers, including David Boies, the family litigated the case for close to two decades.

Following Claude's death in 2010, his son David took control of the case.<sup>158</sup>

In 2022, after decades of no-holds-barred litigation including a bench trial, the Supreme Court overturned a district court termination of the case upheld by the Ninth Circuit, revived the lawsuit, and remanded it back to the district court. Specifically, the Supreme Court held that the district court erroneously relied on Spanish law instead of California law in adjudicating certain choice of law issues.<sup>159</sup> Writing for the Court, Justice Elana Kagan stated:

The Cassirers sought our review, limited to a single issue: whether a court in an FSIA case raising non-federal claims (relating to property, torts, contracts, and so forth) should apply the forum State's choice-of-law rule, or instead use a federal one. We granted certiorari...because that question has generated a split in the Courts of Appeals. The Ninth Circuit stands alone in using a federal choice-of-law rule to pick the applicable substantive law. . . . All other Courts of Appeals to have addressed the issue apply the choice-of-law rule of the forum State. We agree with that more common approach, and now vacate the judgment below.<sup>160</sup>

Justice Kagan added, "Our ruling is as simple as the conflict over its rightful owner has been vexed."<sup>161</sup> This is an eloquent understatement.

#### *E. PHILLIP V. GERMANY*

In *Phillip v. Germany*, the heirs of a consortium of Jewish art dealers sued in the District of Columbia to recover a collection of ancient church artifacts (known as the Guelph Treasure) now worth \$250 million, and once considered

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<sup>156</sup> *Cassirer v. TBC.*, No. CV 05-3459-JFW (EX), 2015 WL 12672087, at \*2 (C.D. Cal. Mar. 13, 2015); *Cassirer v. TBC.*, 862 F.3d 951, 957 (9th Cir. 2017).

<sup>157</sup> *Cassirer*, 862 F.3d at 957.

<sup>158</sup> *Id.* at 957 n.5.

<sup>159</sup> *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S.Ct. 1502 (2022).

<sup>160</sup> *Id.* at 1510 (2022).

<sup>161</sup> *Id.*

the crown jewels of Prussia.<sup>162</sup> The dealers alleged that Goering acquired the Guelph Treasures through forced duress sales for one-third of their value.<sup>163</sup>

Early on, the District of Columbia Circuit upheld the dealer's right to bring the case against the German museums holding the Guelph Treasure, but not against the German government.<sup>164</sup> The Supreme Court, however, overturned the District of Columbia Circuit's holding on the ground that the German government acquired this property from German citizens before the Nazis took control of Germany. While the Supreme Court left open a narrow path for the plaintiffs to possibly continue their case if they could show the dealers were no longer German citizens at the time of the sales, they were unable to do so, but that possibility remains open in ongoing litigation.<sup>165</sup>

#### F. SIMON V. THE REPUBLIC OF HUNGARY

The Herzog family heirs sued in the District of Columbia to recover the family's collection of El Greco, Monet, Renoir, and other paintings.<sup>166</sup> The family's recovery efforts began after they fled Nazi-occupied Hungary in 1944, leaving their art behind.<sup>167</sup> Adolf Eichmann – the Nazi leader who oversaw the day-to-day logistics of the “Final Solution” – shipped some Herzog-owned paintings to Germany, leaving a substantial collection in Hungary.<sup>168</sup>

This longstanding case, *Simon v. the Republic of Hungary*, came to an abrupt end largely based on the Supreme Court decision in *Phillip*, heard and decided together.<sup>169</sup> In *Simon*, the Supreme Court reversed an earlier largely favorable D.C. Circuit court opinion *Simon v. Hungary* on the ground that Hungary confiscated property belonging to its own Hungarian citizens, which the Supreme Court held did not give the United States jurisdiction over this

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<sup>162</sup> *Phillip v. Germany*, 2017 WL 1207408 at \*2 (D. D.C. Mar. 31, 2017). The dealers were forced to deposit some of the funds into a blocked account subject to “flight taxes” that Jews paid to escape from Germany. *Id.* at \* 1; MELISSA EDDY, *German Panel Says Medieval Treasure Should Not be Returned to Heirs of Jewish Owners*, N.Y. TIMES, March 20, 2014.

<sup>163</sup> *Phillip*, 2017 WL 1207408 at \*2.

<sup>164</sup> *Phillip v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018).

<sup>165</sup> *Phillip*, 141 S.Ct. \_\_\_, 703, \_\_ (2021). Pursuant to this holding, cases might be brought in United States if the Nazi government had taken art or forced the duress sale of such art after the Nuremberg Laws went into effect and German Jews lost their citizenship rights. (The Supreme Court apparently did not want the United States to become home for cases in which communist and socialist nations aside from the Nazi regime nationalized or otherwise looted private property); BENJAMIN SUTTON, *Appeals court judges hear latest argument in Nazi-era Guelph Treasure restitution claim*, THE ART NEWSPAPER (April 20, 2023); *MDA UK receives renaissance sculpture looted by Nazis during World War II*, JEWISH NEWS (April 19, 2023).

<sup>166</sup> *Id.* at 1097.

<sup>167</sup> *Id.*

<sup>168</sup> LILY ROTHMAN, *Operation Finale Shows the Capture of Nazi Adolf Eichmann. But What Happened at His Trial Changed History, Too*, TIME, Aug. 29, 2018. In May 1960, The Israeli Mossad captured Eichmann in Buenos Aires and transported him to Israel where he was tried in Jerusalem for his crimes, prosecuted by the Jewish state of Israel, convicted, and hung.

<sup>169</sup> *de Csepel v. Republic of Hungary*, 859 F. 3d 1094 (D.C. Cir. 2017).

art (even though Hungary had effectively been under Nazi control at the time of the confiscations).<sup>170</sup>

Based on *Simon* and *Phillip*, the United States could only potentially serve as a forum for cases in which the Nazis government stole or abetted the theft of property owned by Jews after they lost their German citizenship, but not for governmental-abetted thefts while Jews still retained their full German citizenship rights.

The Supreme Court apparently did not want the United States to become a flood of cases where communist and socialist nations – aside from the Nazi regime – nationalized or otherwise confiscated and/or redistributed private property.

*Phillip* and *Simon* indicate that the Supreme Court viewed the Nazis' theft more than just typically nationalistic socialism but also as part and parcel of worse conduct namely state-sponsored confiscation and redistribution of a persecuted and targeted minorities' property as a prelude to genocide.

#### G. VON SAHER V. NORTON SIMON MUSEUM

*Von Saher v. North Simon Museum*,<sup>171</sup> though also unsuccessful after years of litigation, has a rich history. This case involved a dispute over two life-size oil-on-panel paintings (the “Cranachs”) by Lucas Cranach the Elder, painted around 1530.<sup>172</sup> The panels, “Adam” and “Eve,” hang in Pasadena's Norton Simon Museum.<sup>173</sup> “Adam” stands under the Tree of Knowledge, cradling an apple, while beneath the same tree, “Eve” listens to a serpent and holds another apple in her upright hand.<sup>174</sup> They only wear fig leaves.<sup>175</sup>

The Nazis stole the panels from Jacques Goudstikker, who owned an Amsterdam gallery specializing in sixteenth and seventh-century European masters.<sup>176</sup> He bought a countryside castle and married Viennese opera star Desirée (“Desi”) Von Halban-Kurz.<sup>177</sup> But their “charmed life” ended in 1940 after Nazi troops invaded Holland.<sup>178</sup> Fearing for their safety, the

<sup>170</sup> See *Phillip v. Federal Republic of Germany*, 894 F.3d 406, 410-14 (D.C. Cir. 2018).

<sup>171</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F. 3d 712 (9th Cir. 2014).

<sup>172</sup> *Id.* at 715.

<sup>173</sup> *Von Saher*, 897 F.3d at 1143.

<sup>174</sup> *Id.*

<sup>175</sup> BERT DEMARSIN, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ART & ENT. L.J. 255, 280 (2010).

<sup>176</sup> *Id.* at 276; *Von Saher*, 754 F. 3d at 276; ALAN RIDING, *Goering, Rembrandt and the Little Black Book*, N.Y. TIMES, Mar. 26, 2006.

<sup>177</sup> BERT DEMARSIN, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ART & ENT. L.J. 255 at 277.

<sup>178</sup> *Von Saher*, 754 F.3d at 715.



Goudstikkers fled.<sup>179</sup> Without time to secure exit visas, they boarded the SS Bodegraven, a blacked-out Freightliner bound for South America.<sup>180</sup>

At sea, Goudstikker fell through an uncovered hatch in the ship's deck, broke his neck, and died.<sup>181</sup> He kept a black 4.7-by-7-inch leather notebook in his jacket pocket describing 1,113 artworks,<sup>182</sup> which enabled his heirs to recover a portion of looted art.<sup>183</sup>

With the Goudstikkers gone, Goering and Alois Miedl, a Nazi collaborator, divvied up the Goudstikkers' property.<sup>184</sup> Through sham sales, Goering paid \$1.1 million (now \$19 million) for 779 masterpieces, including the Cranachs and paintings by Rembrandt, Rubens, Van Dyck, and Van Gogh.<sup>185</sup> Miedl "purchased" 334 paintings, Goudstikker's canal-side gallery, his 12th-century castle (Nijenrode), his Amsterdam home, and his country estate in Amsterdam's suburbs for \$307,000 (now \$5.3 million), a fraction of the art and properties' value.<sup>186</sup> Despite lacking authorization, Goudstikker employees negotiated these sales.<sup>187</sup> Goering and Miedl retained a number of the paintings and sold others.<sup>188</sup>

After World War II, the Allies recovered four hundred of the artworks, which they gave to the Dutch government.<sup>189</sup> Instead of returning looted art and other property to the Goudstikker family, the Dutch government kept it.<sup>190</sup>

In 1946, Desi Goudstikker, then an American, returned to the Netherlands to "repurchase" a small percentage of her property, including her Amsterdam home and a fraction of her family's art, from the Dutch government.<sup>191</sup>

In 1966, the Dutch government sold the Cranach panels for an undisclosed price to a Russian citizen,<sup>192</sup> who five years later sold them to

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<sup>179</sup> BERT DEMARSIN, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ART & ENT. L.J. 2 at 276; BENJAMIN GENOCCHIO, *Seized, Reclaimed and Now on View*, N.Y. TIMES, Apr. 27, 2008.

<sup>180</sup> *Von Saher*, 754 F.3d at 715.

<sup>181</sup> *Von Saher*, 754 F.3d at 715-16; DEMARSIN, *supra* note \_\_, at 277; RIDING, *supra* note \_\_.

<sup>182</sup> *Von Saher*, 754 F.3d at 715.

<sup>183</sup> After Jacques' death, his wife, Desi, acquired the black notebook and later used its entries to retribute the Goudstikker collection. The notebook lists the Cranachs as part of their collection. *Von Saher*, 754 F.3d at 715.

<sup>184</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141, 1144 (9th Cir. 2018).

<sup>185</sup> BERT DEMARSIN, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ART & ENT. L.J. at 277

<sup>186</sup> *Id.*; *Von Saher*, 897 F.3d at 1144.

<sup>187</sup> *Von Saher*, 754 F. 3d at 715.

<sup>188</sup> *Id.*

<sup>189</sup> *Von Saher*, 754 F. 3d at 716-17.

<sup>190</sup> *Id.* at 716. ("The Dutch government characterized the Göring and Miedl transactions as voluntary sales undertaken without coercion. Thus, the government determined that it had no obligation to restore the looted property to the Goudstikker family.")

<sup>191</sup> *Von Saher*, 754 F. 3d at 716-17.

<sup>192</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (SSX), 2016 WL 7626153, at \*6 (C.D. Cal. Aug. 9, 2016), *aff'd*, 897 F.3d 1141 (9th Cir. 2018).

Norton Simon for \$800,000 (now \$4.8 million).<sup>193</sup> Currently, they are worth approximately \$30 million.<sup>194</sup>

Since Desi Goudstikker's passing, and that of her son, Edo Von Saher (who took his stepfather's last name), Edo's wife, Marei Von Saher, a former Olympic figure skater, and her daughters, spearheaded efforts to recover the artworks the Goudstikkers lost.<sup>195</sup>

In 2006, the Dutch government returned 200 paintings (plundered by Goering) to Von Saher.<sup>196</sup> Following lengthy negotiations, the Dutch government concluded that it had wrongfully retained this art for decades based on a "restitution policy" that was "legalistic, bureaucratic, cold and often even callous"<sup>197</sup> – a decision made too late to recover the Cranach panels.

In 2007, after unsuccessful settlement negotiations, Von Saher sued the Norton Simon Foundation to recover "Adam" and "Eve" – entries 2721 and 2722 in Jacques Goudstikker's notebook.<sup>198</sup>

Following years of litigation, including a series of dismissals overturned by the Ninth Circuit, the district court dismissed that lawsuit based on the "act of state doctrine."<sup>199</sup> According to that doctrine, every sovereign state is bound to respect the independence of other sovereign states.<sup>200</sup>

The district court judge, John F. Walter, held that under applicable law the Netherlands properly held title to the painting when it conveyed it to the Russian citizen,<sup>201</sup> who, therefore, conveyed good title to the Norton Simon Museum.<sup>202</sup> In 2018, the Ninth Circuit upheld that decision.<sup>203</sup>

#### *H. REIF V. NAGY*

Heirs of Fritz Grunbaum, a Jewish Viennese cabaret performer, art collector and critic of Hitler,<sup>204</sup> brought *Reif* to recover two Egon Schiele paintings, "*Woman in a Black Pinafore* and *Woman Hiding Her Face*,"<sup>205</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> Carolina A. Miranda, *Court Rules Museum Can Keep Nazi-looted Adam and Eve Masterpieces with a Hidden Past*, L.A. TIMES, Aug. 22, 2016.

<sup>195</sup> See Benjamin Genocchio, *Seized, Reclaimed and Now on View*, N.Y. TIMES, Apr. 27, 2008.

<sup>196</sup> *Von Saher*, 754 F.3d at 718, 722-23.

<sup>197</sup> *Id.*

<sup>198</sup> Demarsin, *supra* note 177, at 280.

<sup>199</sup> *Von Saher*, 897 F.3d 1141, 1143 (2018).

<sup>200</sup> *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory.").

<sup>201</sup> *Von Saher*, 897 F.3d 1141, 1143 (2018).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

together worth approximately \$5 million.<sup>206</sup> Grunbaum fled Austria in 1941 and moved to Czechoslovakia.<sup>207</sup> The Nazis captured him, imprisoned him in the Dachau concentration camp outside Munich then murdered him<sup>208</sup> along with his wife, Elisabeth, and stole their 449-piece art collection.<sup>209</sup>

Decades later, the Grunbaums' heirs filed suit in New York, where the trial court granted summary judgment in their favor,<sup>210</sup> a decision affirmed by New York's appellate court.<sup>211</sup> Both holdings meticulously describe how Nazi-looted art circulated throughout the world.<sup>212</sup> In granting the Grunbaums' heirs' motion for summary judgment, state Supreme Court Judge Charles E. Ramos rejected the defendants' statute of limitations and other defenses.<sup>213</sup> He wrote: "Although Defendants argue that the HEAR Act is intended to be inapplicable, this argument is absurd, as the act is intended to apply to cases precisely like this one, where Nazi-looted art is at issue."<sup>214</sup>

In affirming, New York's Appellate Division concluded: "The tragic consequences of the Nazi occupation of Europe on the lives, liberty, and property of the Jews continue to confront us today."<sup>215</sup>

#### V. CONFINING DISPUTE RESOLUTIONS TO PRIVATE NEGOTIATIONS, MEDIATIONS, OR ARBITRATIONS IS WRONG

Such personal and historical accounts cannot be replicated outside courtrooms through alternative dispute resolutions. Nonetheless, critics of Nazi-looted art litigation contend that court cases should be barred. They are wrong. As critics see it, the rights of those who acquire "cultural property" are paramount.<sup>216</sup>

Based on this faulty logic, Nazi-looted art must be treated like ancient Greek artifacts have been handled. Thus, Norman Rosenthal, former Exhibitions Secretary of the British Royal Academy of Arts argued: "If

<sup>206</sup> Jason Grant, *Jewish Heirs' Worldwide Fight to Reclaim Nazi-Stolen Art Plays Out in Manhattan Courts*, NEW YORK LAW JOURNAL, Dec. 26, 2018, <https://www.law.com/newyorklawjournal/2018/12/26/jewish-heirs-worldwide-fight-to-reclaim-nazi-stolen-art-plays-out-in-manhattan-courts/.s>.

<sup>207</sup> *Reif v. Nagy*, No. 161799/15, 2019 WL 2931960 \*1 (N.Y. App. Div. July 9, 2019).

<sup>208</sup> *Id.* at \*3.

<sup>209</sup> *Id.* at \*2.

<sup>210</sup> *Id.*

<sup>211</sup> *Reif v. Nagy*, 61 Misc.3d at 631; *Reif v. Nagy*, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019).

<sup>212</sup> *Reif v. Nagy*, No. 161799/15, 2019 WL 2931960 at \* 4-7 (2019).

<sup>213</sup> *Reif v. Nagy*, 61 Misc. 3d 319 at 323-30 (N.Y. Sup. Ct. 2018).

<sup>214</sup> *Id.* at 328.

<sup>215</sup> *Reif v. Nagy*, 106 N.Y.S.3d 5 at 24 (N.Y. App. Div. 2019).

<sup>216</sup> See, e.g., Jason Barnes, *Holocaust Expropriated Art Recover (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT'L L. 593, 626 (2018); see Jonathan Jones, *Should All Looted Art be Returned*, GUARDIAN, Jan. 9, 2009, <https://www.theguardian.com/artanddesign/jonathanjonesblog/2009/jan/09/looted-art-norman-rosenthal>; SPIEGEL Interview with British Art Expert: "We Must Live in the Present," SPIEGEL, Apr. 9, 2009, <https://www.spiegel.de/international/germany/spiegel-interview-with-british-art-expert-we-must-live-in-the-present-a-618399.html>; Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. (1995).

valuable objects have ended up in the public sphere, even on account of terrible facts of history, then that is the way it is.”<sup>217</sup>

Critics of litigation further argue that the Holocaust like other “crimes against humanity” should only serve to highlight shared collective moral lessons.<sup>218</sup> But these arguments ignore the unique evils of the Holocaust including the fact that the Nazis planned and nearly succeeded in carrying out a genocide of European Jews. They also ignore the realities that Nazi-looted art cases must be brought on behalf of identifiable victims, who bear heavy individual burdens of proof and often great financial and emotional costs in pursuing identifiable wrongs committed by identifiable parties.

Such critics seek to deny these victims of Nazi looting and their identifiable ancestors the opportunity for redress and foreclose simultaneous opportunities to advance broader transitional justice goals.

Additionally, while many Nazi-looted art disputes can be settled through private negotiations, mediations, and arbitrations,<sup>219</sup> not all can be resolved outside courthouses. This is particularly true for those claims asserted against well-heeled collectors determined at great cost to retain artworks in their possession.

Furthermore, a mosaic of cases litigated in courtrooms across America has particularly significant value. Not only do these cases enhance the historical record of Nazi genocidal policy. They also increase the probability such atrocities – and war crimes akin to them – are not relegated to a vague “memory bank” of mayhem and destruction, denying victims their due, allowing criminals to escape accountability, fostering a culture of impunity, and leading to future grave, mass criminality including genocides and “ethnic cleansings.”

#### VI. LESSONS LEARNED FROM CENTURIES OF ANTI-SEMITISM AND MORE THAN A CENTURY OF SOCIALISM AS TO WHY NAZI-LOOTED ART CASES REMAIN TIMELY

Finally, alternative forms of dispute resolution are insufficient because Nazi-looted art cases remain both relevant to our time and timely.<sup>220</sup> Even

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<sup>217</sup> Norman Rosenthal, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Nov. 30, 2008.

<sup>218</sup> See, e.g., CLAUDIO CORRADETTI & NIR EISIKOVITS, *THEORIZING TRANSITIONAL JUSTICE*, 15 (2016).

<sup>219</sup> Herrick Feinstein LLP, *supra* note 34.

<sup>220</sup> In fact, Nazi-looted art remains today in 2023 a vibrant subject of much national and international public discussion, debate, and hotly contested political and legal disputes. See, e.g., ASAF SHALEV, *Tel Aviv art museum cancels event with Christie's following auction of jewelry collection with Nazi ties*, JTA (July 2, 2023); *Art looted by Nazis in Belgium still in Dutch museums, government buildings*, N.Y. TIMES (June 22, 2023); JACKIE HAJDENBERG, *A German museum curator is personally returning art looted by the Nazis to the descendants of Holocaust victims*, JTA (June 14, 2023); GABY WINE, *Restituted art sale funds go to Holocaust survivors in 'completing of the circle,'* **THE JC (June 14, 2023)**; CATHERINE HICKLEY, *German Panel Says Kandinsky Painting Should Go Back to Jewish Heirs: The decisions of the government panel, which handles claims about art lost or looted in the Nazi-era, are not legally binding, but are nearly always followed*, N.Y. TIMES (JUNE 13, 2023);

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MALCOLM GAY, *Hitler wanted this painting for his personal museum — now it's promised to the MFA*, THE BOSTON GLOBE (June 11, 2023); CATHERINE HICKLEY, *German city restitutes a Renoir to the heirs of a Jewish banker and buys it back*, THE ART NEWSPAPER (June 7, 2023); MONIKA SCISLOWSKA, *Priceless painting looted by Nazis during World War II returns to Poland from Japan*, THE ASSOCIATED PRESS, (May 31, 2023); *Works Looted By The Nazis: Unanimity In The [French] Senate To Facilitate Restitution Procedures*, AFP (May 23, 2023); JENNIFER RANKIN, *Fears looted Nazi art still hanging in Belgian and British galleries*, THE GUARDIAN. (May 20, 2023); COLIN MOYNIHAN, *Sotheby's Provenance Disputed in Claim by Heirs for Art Lost in Nazi Era*, N.Y. TIMES (May 19, 2023); ISABEL VINCENT, *Questions linger about Nazi past of Klimt art that sold for \$53M this week*, N.Y. POST (May 18, 2023); EILEEN KINSELLA, *The First Auction of Late Billionaire Heidi Horten's Controversial Jewelry Proves Wildly Successful, Raking in \$156 Million: A late-breaking revelation that Horten's husband 'profited from the situation' of Jewish department store orders starting in 1036 did not hamper bidding*, ARTNET (May 11, 2023); CATHERINE HICKLEY, *Germany's museums buy back 'degenerate' artworks purged by the Nazis*, THE ART NEWSPAPER (May 10, 2023); ROBIN POGREBIN and GRAHAM BOWLEY, *After Seizures, the Met Sets a Plan to Scour Collections for Looted Art*, N.Y. TIMES, (May 9, 2023); RUPERT NEATE, *Auction of £120m of jewels to go ahead despite Jewish groups' concerns*, THE GUARDIAN (May 9, 2023); *Frankfurt returns painting to heirs of Jewish collector murdered in the Holocaust*, JNS (May 4, 2023); VINCENT NOCE, *France's long-awaited restitution policy is finally here*, THE ART NEWSPAPER (April 26, 2023); CATHERINE HICKLEY, *Dusseldorf settles with Jewish dealer's heirs on portrait that hung in mayor's office*, The Art Newspaper (April 21, 2023); BENJAMIN SUTTON, *Appeals court judges hear latest argument in Nazi-era Guelph Treasure restitution claim*, THE ART NEWSPAPER (April 20, 2023); *MDA UK receives renaissance sculpture looted by Nazis during World War II*, JEWISH NEWS (April 19, 2023); LESLIE KATZ, *Nazi-looted silver cup comes home to Bay Area descendant after 80 years* *The Jewish News of Northern California* (April 17, 2023); CATHERINE HICKLEY, *A major Estonian art collection looted by the Nazis is probably in Belarus, new report finds: With the help of Kyiv archives, a historian has investigated the fate of 5,000 works of art and 20,000 books owned by Julius Genss*, THE ART NEWSPAPER (April 12, 2023); MILTON ESTEROW, *Not Picassos, but Still Precious: Museums Return Silver Lost to the Nazis: Some German institutions have begun to give back cups, candlesticks, teapots and other items of crafted silver that Jews were forced to surrender during the reign of the Third Reich*, N.Y. 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TIMES (April 4, 2023); GARETH HARRIS, *Courbet painting—seized by the Nazis and owned by a reverend—to be returned to its original owners* THE ART NEWSPAPER (March 30, 2023); JAMES JACKSON, *Munich museum takes down Picasso portrait amid restitution dispute: The painting, Madame Older, was previously owned by the prominent collector Paul von Mendelssohn-Bartholdy in the 1950s*, The Art Newspaper, (March 30, 2023); LEE HARPIN, *Lord Pickles hosts emergency meeting on injustices over Holocaust property restitution: Envoys from America, Europe and Israel attend first meeting in London as Pickles admits 'We need to get a grip on this in the next five years or it will be too late.'* JEWISH NEWS (March 29, 2023); CANAAN LIDOR, *Art in spotlight as 9 countries' Holocaust envoys hold 1st gathering on restitution*, TIMES OF ISRAEL (March 29, 2023); OLIVER MOODY, *Picasso portrait pulled from gallery wall in ownership row: Its original owner, a Jewish banker, was forced to give it up when the Nazis came to power*, THE TIMES (March 28, 2023); *Kunsthau Zurich launches new strategy on Nazi looted art: The Kunsthau Zurich museum says it is strengthening its provenance research and giving itself more resources to deal with the problem of ill-gotten cultural property*, SWISSINFO (March 14, 2023); *Major Swiss art museum reviewing collection for Nazi-looted pieces*, AFP (March 14, 2023); SHIRYN GHERMEZIAN, *Swiss Art Foundation Launches Probe to Discover if Items Were Stolen by Nazis From Jews*, THE ALGEMEINER (March 9, 2023); OLIVER MOODY, *German royal heirs give up on artworks taken in war*, THE TIMES, (March 9, 2003); JULIA HITZ, *Picasso dispute: Is "Madame Soler" looted art? Paul von Mendelssohn-Bartholdy's heirs want the painting back, but the Bavarian State Painting Collections sees itself as the rightful owner. An unresolved case with a bitter aftertaste*, (March 2, 2023); ALEXANDRA TEMAYNE-PENGELLY, *A New York Law Requires Museums to Label Nazi-Looted Art. But Are They Following It?: A new bill requires New York museums to label artwork in their collections which were seized by the Nazis. But without a regulatory agency enforcing it, the law hasn't changed much*, NY OBSERVER (February 28, 2023); VINCENT NOCE, *Musée D'Orsay ordered by Paris court to return four masterpieces by Renoir, Cézanne and Gauguin stolen during Second World War, The works were owned by influential French dealer Ambroise Vollard and will be returned to his heirs*, THE ART NEWSPAPER (February 16, 2023); *Czech museums return Nazi-looted art to Jewish owner's descendants*, EXPATS.CZ (February 15, 2023); Superintendent Adrienne A. Harris Announces Three Paintings Returned to the Heirs of Dr.

though the Nazis murdered six million Jews and sought to annihilate all Europe Jews, that tragic history is being forgotten at a time of growing antisemitism and violence toward Jews, surging tribalism, socialism, fascism, and other forms of illiberalism. This was not supposed to happen.

In 1989, Francis Fukuyama predicted a flowering of liberal democracies and republics, ushering in a new era of tolerance, peace, democracy, and religious ethnic, and racial harmony.<sup>221</sup> This did not occur; instead, history returned with a vengeance such that today we are witnessing a rebirth of dark forces of tribalism, xenophobia, illiberalism, authoritarianism, and totalitarianism.<sup>222</sup>

Fukuyama contends that he underestimated identity or group politics.<sup>223</sup> He did. Though that is not all. Human nature remains the same. Taking advantage of economic, political, and social crises, ignoring Saint Augustine's

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Ismar Littmann: Prussian Cultural Heritage Foundation (SPK) returns paintings by Pechstein, Schmidt, and Mense Heirs donate Mense Painting to the Nationalgalerie of the Staatlichen Museen, NY Department of Financial Services (February 15, 2023); DAVID D'ARCY, *Art from persecuted Jewish dealer draws scrutiny at National Gallery of Art in Washington, DC: Findings about the provenance of three Old Master drawings in the museum's collection may best the pro-restitution stance recently adopted at US national institutions*, THE ART NEWSPAPER (February 15, 2023); COLIN MOYNIHAN, *Ronald S. Lauder Reaches Agreement on Klimt Painting with Jewish Heirs*, N.Y. TIMES (February 10, 2023); SARAH CASCONI, *A Prized Kandinsky Painting Recently Restituted to the Heirs of a Jewish Collector May Fetch \$45 Million at Sotheby's: The Van Abbemuseum restituted the painting to the heirs*, ARTNET, (February 8, 2023); CATHERINE HICKLEY, *Is Nazi Loot Amid His 6,000 Oils, Some Grenades and Napoleon's Toothbrush?: The daughter of an eccentric Swiss collector has asked an independent panel to review whether items in his massive collection were stolen from Jews during World War II*, N.Y. TIMES (February 7, 2023); *Twice Expropriated: Poland and Spain misrepresent restitution of two paintings* COMMISSION FOR LOOTED ART IN EUROPE (February 4, 2023); GEORGINA ADAM, *New French restitution laws should benefit the market—and maybe force change in Britain too?* ART MARKET EYE (February 2, 2023); VINCENT NOCE, *French court orders Christie's to restitute a Nazi-looted painting sold in London: As the panel was looted in Paris, the magistrates claimed jurisdiction of the French courts over the High Court in London*, THE ART NEWSPAPER (February 1, 2023); ANNA SANSOM, *Christie's marks 25 years of the Washington Principles on Nazi-confiscated art*, THE ART NEWSPAPER (January 30, 2023); MARTIN BAILEY, *Was Van Gogh's olive grove landscape another Nazi-era 'forced sale'? We uncover the tangled tale of the painting controversially sold off by New York's Metropolitan Museum of Art in 1972 and now in an Athens museum*, THE ART NEWSPAPER (January 27, 2023); *Reclaiming lost history: 25 years of the Washington Principles on Nazi-Confiscated Art*, CHRISTIE'S (January 26, 2023); MICHAEL HOROWITZ, *Virgin Mary sculpture sold under Nazi duress returned to Jewish owner's heirs: Germany finds 16<sup>th</sup>-century breastfeeding statuette was sold in 19367 by collector Jakob Goldschmidt under unfair financial conditions*, TIMES OF ISRAEL (January 24, 2023); BEN BRACHFELD, *Descendants of Jewish refugees escaping Nazis sue Guggenheim Museum for \$200M Picasso painting*, AMNY (January 22, 2023); DEVORAH LAUTER, *France's Ministry of Culture Is Pushing Forward a Trio of Groundbreaking Laws That May Have Sweeping Effects on Restitution*, ARNET (January 18, 2023); TYLER HAYDEN, *Santa Barbara Museum of Art Sued over Nazi-Looted Drawing: Heirs of Jewish Cabaret Singer Killed in Concentration Camp Demand Return of Valuable Piece*, SANTA BARBARA INDEPENDENT (January 17, 2023); ANNY SHAW, *Another monumental Munch painting once hidden from Nazis in a barn heads to the block: Heirs of Jewish art critic forced to sell the work estimated at \$15m now set to benefit from Sotheby's auction*, THE ART NEWSPAPER (January 16, 2023); MARTIN BAILEY, *Van Gogh's Tokyo Sunflowers: Was it a Nazi forced sale? And is the painting now worth \$250m?: Bought for a Japanese museum in 1987, the masterpiece has just claimed by the heirs of a Jewish Berlin banker*, THE ART NEWSPAPER (January 13, 2023); STUART DOWELL, *Art historian and TV host Magdalena Ogórek to set up Museum of Stolen Art*, THE FIRST NEWS (January 10, 2023)

<sup>221</sup> Francis Fukuyama, *The End of History*, NATIONAL INTEREST (1989).

<sup>222</sup> See generally FRANCIS FUKUYAMA, *IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT* (2018).

<sup>223</sup> *Id.*

warning that “cursed is everyone who places his hope in changing the nature of man,”<sup>224</sup> and empowered by technology and social media, illiberal governments have mushroomed.<sup>225</sup> Their growth indicates that “every age has its own fascism,”<sup>226</sup> and that President Ronald Reagan had it right when he said: “Freedom is a fragile thing and it’s never more than one generation away from extinction.”<sup>227</sup>

Today, socialist, communist, and fascist, threats to freedom, individual civil rights, due process, civil liberties, and public safety come from multiple directions. These threats come from the Chinese Communist Party with its social credit system, and which has incarcerated millions of Muslim Uighurs and other minorities in “re-educate” concentration camps.<sup>228</sup> They come from neo-Nazis and white supremacists who marched with torch lights in Charlottesville, Virginia, chanting “Jews Shall Not Replace Us.” And they come from so-called woke socialists and “progressives” who regressively censor, cancel, slander, slur, suppress, and blacklist fellow Americans – increasingly with help from the federal government and Big Tech social media giants – in a 21<sup>st</sup> Century form of “McCarthyism.”<sup>229</sup> *Wall Street Journal* columnist Mary Anastasia O’Grady described growing illiberalism this way:

In the past two decades, the institutions necessary to ensure political and ideological competition have been destroyed . . . . The problem isn’t any one election in which a politician who prefers socialism over individual freedom prevails. It’s the extremist view – left or right – that an electoral victory is a mandate to dismantle the institutional framework that protects minorities and blocks the ambitions of absolutism. . . . Media, the arts, academia, science political activism, and the judicial system become illiberal weapons.<sup>230</sup>

Moreover, since the Holocaust, majorities have persecuted insular, envied, minorities leading to genocides in Cambodia, China, Rwanda, Bangladesh, East Timor, the Soviet Union, Guatemala, Bosnia, Kosovo, Serbia, Rwanda, Darfur, Myanmar, and elsewhere<sup>231</sup> while hatred directed at

<sup>224</sup> QUOTEFANCY, <https://quotefancy.com/quote/906004/Saint-Augustine-Cursed-is-everyone-who-places-his-hope-in-changing-the-nature-of-man>.

<sup>225</sup> See generally, GIDEON RACHMAN, *THE AGE OF THE STRONGMAN: HOW THE CULT OF THE LEADER THREATENS DEMOCRACY AROUND THE WORLD* (2022); Yuval Noah Harari, *Why Technology Favors Tyranny*, ATLANTIC (Oct. 2018).

<sup>226</sup> PRIMO LEVI, *THE BLACK HOLE OF AUSCHWITZ*, 31 (2005).

<sup>227</sup> Governor Ronald Reagan, Inaugural Address (Jan. 5, 1967), <https://www.reaganlibrary.gov/archives/speech/january-5-1967-inaugural-address-public-ceremony>.

<sup>228</sup> See generally, KAI STRITTMATTER, *WE HAVE BEEN HARMONIZED: LIFE IN CHINA’S SURVEILLANCE STATE* (2020).

<sup>229</sup> See, e.g., ALAN DERSHOWITZ, *CANCEL CULTURE: THE LATEST ATTACK ON FREE SPEECH AND DUE PROCESS* (2020).

<sup>230</sup> Mary Anastasi O’Grady, *When Populism Turns to Tyranny*, WALL ST. J., Dec. 27, 2021.

<sup>231</sup> See, e.g., Scott Lamb, *Genocide Since 1945: Never Again*, SPIEGEL, <http://www.spiegel.de/international/genocide-since-1945-never-again-a-338612.html>; Editorial Board, *What is Happening in Myanmar is Genocide: Call It by Its Name*, WASH. POST, Aug. 29, 2018.

Jews and the Jewish nation of Israel and violence toward Jews has spread exponentially in the United States.<sup>232</sup>

Worldwide, on “any given issue – from economic inequality to the financial crisis to immigration and terrorism – old and new conspiracy theories blaming the Jews have gained new traction, abetted by the political polarization and general crisis of confidence permeating Western democracies.”<sup>233</sup> Such antisemitism remains prevalent among a spectrum of political parties and ideologies.<sup>234</sup>

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<sup>232</sup> Yaroslav Trofimov, *The New Anti-Semitism: In Europe and the U.S., Rising Political Forces on Both the Right and the Left Have Revived Old Patterns That Scapegoat Jews For Society's Ills*, THE WALL STREET JOURNAL, July 12, 2019; see also, e.g., BARI WEISS, HOW TO FIGHT ANTI-SEMITISM (2019); Ariel Ben Solomon, *Supremacists and Jihadis Form 'Two-Pronged Attack' Threatening Jews in US*, ISRAEL HAYOM, Aug. 6, 2019; Joe Heim and Samantha Schmidt, *Anti-Semitism In America: Rising Hate Speech Turns to Terror*, THE WASHINGTON POST, Oct. 28, 2018; Bridget Johnson, *The Hate Spewed in Charlottesville Helps ISIS and al-Qaeda: A Culture of Anti-Semitism Breeds Extremism and Terrorist Sympathizers*, OBSERVER, Aug. 16, 2017; Jon Henley, *Anti-Semitism Rising Sharply Across Europe, Latest Figures Show: France Reports 74% Rise in Offenses Against Jews and Germany Records 60% Surge in Violent Attacks*, THE GUARDIAN, Feb. 15, 2019; JO BECKER, *How Nationalism Found A Home Sweden: A Global Machine Fuels the Far Right's Rise*, N.Y. TIMES, Aug. 11, 2019; see also James Angelos, *The New German Anti-Semitism*, N.Y. TIMES MAGAZINE, May 21, 2019 (forty-one percent of the most serious incidents directed at Jews in Germany stemmed from the conduct of “someone with a Muslim extremist view.”); Even more so anti-Semitism pervades the Islamic world. See, e.g., Ayaan Hirsi Ali, *Can Ilhan Omar Overcome Her Prejudice?* WALL STREET JOURNAL, July 12, 2019. Hirsi, who grew up in Somalia, writes:

Most Americans are familiar with the classic Western flavors of anti-Semitism: the Christian, European, white-supremacist and Communist types. But little attention has been paid to the special case of Muslim anti-Semitism. That is a pity because today it is anti-Semitism's most zealous, most potent, and most underestimated form. . . Muslim anti-Semitism has a broader base, and its propagators have had the time and resources to spread it widely.

<sup>233</sup> See Trofimov, *supra* note 233.

<sup>234</sup> See, e.g., Bret Stephens, *Anti-Semitism and What Feeds It*, N.Y. TIMES, October 26, 2020; e.g., Will Carless, *White Supremacist Propaganda Hit an all-time high in 2020, New Report Says*, USA TODAY, March 17, 2021; ANDY NGO, UNMASKED: INSIDE ANTIFA'S RADICAL PLAN TO DESTROY DEMOCRACY (2021); See, also e.g., Editorial, *Anti-Semitism Rises Anew in Europe*, N.Y. TIMES, May 27, 2019. (citing November 2018 CNN poll); William Echikson, *Viktor Orban's Anti-Semitism Problem*, POLITICO, May 13, 2019; JO BECKER, *How Nationalism Found A Home Sweden: A Global Machine Fuels the Far Right's Rise*, N.Y. TIMES, Aug. 11, 2019; *Labour anti-Semitism: Corbyn announces plan to speed up expulsions*, BBC July 22, 2019) <https://www.bbc.com/news/uk-politics-49064771>; see also e.g., BARI WEISS, How to Fight Anti-Semitism (2019); YAROSLAV TROFIMOV, *The New Anti-Semitism: In Europe and the U.S., Rising Political Forces on Both the Right and the Left Have Revived Old Patterns That Scapegoat Jews for Society's Ills*, THE WALL STREET JOURNAL, July 12, 2019; Bret Stephens, *Anti-Semitism and What Feeds It*, N.Y. TIMES, October 26, 2020; Ayaan Hirsi Ali, *Can Ilhan Omar Overcome Her Prejudice?* WALL STREET JOURNAL, July 12, 2019; Ariel Ben Solomon, *Supremacists and Jihadis Form 'Two-Pronged Attack' Threatening Jews in US*, ISRAEL HAYOM, Aug. 6, 2019; Joe Heim and Samantha Schmidt, *Anti-Semitism In America: Rising Hate Speech Turns to Terror*, THE WASHINGTON POST, Oct. 28, 2018; Bridget Johnson, *The Hate Spewed in Charlottesville Helps ISIS and al-Qaeda: A Culture of Anti-Semitism Breeds Extremism and Terrorist Sympathizers*, OBSERVER, Aug. 16, 2017; Jon Henley, *Anti-Semitism Rising Sharply Across Europe, Latest Figures Show: France Reports 74% Rise in Offenses Against Jews and Germany Records 60% Surge in Violent Attacks*, THE GUARDIAN, Feb. 15, 2019; RUTH WISSE, *Anti-Semitism Isn't Merely Another Kind of Hatred*, WALL STREET JOURNAL, August 9, 2021.

This anti-Semitism has in some instances been reflected in law. One example of this is that a new law bars Jews from reclaiming or receiving restitution for property that Poles stole from Jewish citizens of Poland during World War II, and a Neo-Nazi's rally in Warsaw drew 60,000 European demonstrators. See generally Daniel Schatz, *Poland must deal with its past – and return stolen property*. NEWSWEEK (May 23, 2019), <https://www.newsweek.com/poland-ww2-stolen-property-compensation-restitution-jews-447-1433764>.



In short, efforts to tarnish Jews and the Jewish religion have dramatically escalated, among persons of all classes and political persuasions, in the Western world.<sup>235</sup> While in the Islamic world, the long-standing effort to destroy the Jewish state of Israel is increasingly supported by Marxism in its many mutated forms.<sup>236</sup>

Another source of illiberalism – gravely endangering the freedom and lives of envied successful minority groups including but not limited to Jews – is the resurgent affection for socialism under its various mutating forms – a modern-day tool of authoritarianism and totalitarianism.<sup>237</sup>

For under the guise of socialism, Nazism, communism, and fascism, the “welfare of the people has always been the alibi of tyrants. . . giving the servants of tyranny a good conscience.”<sup>238</sup> These have been rival ideologies, but in practice and application share much in common.

Writing in *Commentary* magazine, Gary Dreyer notes that Communist violence has been inspired by politics of group theft and re-distribution as well as ethnic persecution.<sup>239</sup> The same can be said of the Nazis, a race-obsessed “national socialist” party. Specifically, Nazism was a caste-based form of socialism mixed with fascism that viewed politics and economics through the lens of race and religion more than class. (Fascism itself is a nationalistic derivative of socialism mainly adopted by former socialists like Benito Mussolini.<sup>240</sup> These socialists made the modest conversion to fascism because

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 101 (1960)). Like Orwell and others who have been on the battlelines opposing tyrants, Camus came to realize that modern social “revolutions” are led by Pied Pipers falsely promising the utopian myth of heaven on earth to disaffected, disgruntled, malcontented masses. These false prophets of hope and purveyors of untold violence foment class and other tribal divisions and exploit human desires and desperation for a better life such as envy, particularly during times of crisis. Such leaders also ineluctably have carried out brutal atrocities in the name of the masses while claiming, as Lenin famously did, that those masses themselves do not understand their own class-conscious interests.

Posing as self-appointed societal saviors, such charlatans are largely elitist, power-hungry, dictatorial, greedy, brutal, bloodthirsty evil thugs who know no limits in their pursuit of absolute power and privilege only to wreak untold death and destruction. Modern-era nihilistic, anarchistic, socialistic, Marxist power-hungry opportunistic groups led by such despotic and totalitarian evildoers include not just the Nazis and Fascists but also the Red Army Faction (Germany), Red Brigade (Italy), Weather Underground (America), Sandinistas (Nicaragua), Communist Party of Cuba, Communist Chinese Party and Maoists, Bolshevik Party (Russia), Chavistas (Venezuela) and Khmer Rouge (Cambodia). These destroyers of civil society for their own benefit and deniers of individual civil liberties harken back even further to the Jacobins during the French Revolution, who despite their bloody, destructive reign-of-terror perversely have become the heroes for some on the far-left today and who even started a popular magazine dedicated to these malefactors. In short, Nazism, like other forms of extreme socialism including Communism, is “the religion of the malcontent. The malcontent is drawn to this religion because it promises him power. Power to take what isn’t his. Power to exact vengeance on the neighbor who has what he wants. Power to satisfy whatever sadistic desires he feels compelled to carry out.” JESSE KELLY, THE ANTI-COMMUNIST MANIFESTO (2023).

<sup>239</sup> Gary Dreyer, *Why and How to Revive American Anti-Communism: A new museum, new legislation, and a renewed moral imperative*, COMMENTARY MAGAZINE, SEP. 2022 at 40.

<sup>240</sup> Mussolini, for example, was the editor-in-chief of *Avanti!* (Forward), Italy’s leading socialist newspaper.

they saw nationalism rather than internationalism as a unifying force in World War I.)<sup>241</sup>

In socialist nations, the centralized government controls the economy, politics, culture, and all other aspects of life. Mass dependency coupled with governmental control of the means of distribution and production (by a bureaucratic and a single party ruling class), which is the essence of socialism, invariably leads to control over all other aspects of social and political life and suppression of dissent referred to as counterrevolution expression. In fascist nations, social control is more diffuse when exercised by an alliance of big-government working hand-in-glove with big business. (Thus, for example, as China has become more fascistic and less Maoist since the 1970s, it has become more authoritarian and less totalitarian).

By his own admissions and policies, Hitler (like Karl Marx)<sup>242</sup> was a lifelong committed self-described socialist<sup>243</sup> and a virulent antisemite whose Nazi party institutionalized antisemitic and socialist policies as jointly laid out in the Nazis' platform.<sup>244</sup>

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<sup>241</sup> Unlike the Nazis, Mussolini was not virulently antisemitic. See, e.g., Mussolini, Benito – Yad Vashem available at <https://www.yadvashem.org> (“Mussolini was not strongly antisemitic. He had close ties to Italian Jews. He was a committed Marxist and Leninist who founded the Fascist party largely because after World War I he saw a nationalistic form of socialism and alliance with big business as more effective than internationally oriented socialism. See generally JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT, FROM MUSSOLINI TO THE POLITICS OF CHANGE (2007).

<sup>242</sup> As with much else, Marx predicted that in a communist world the Jewish religion would become irrelevant or disappear, and therefore there was no need for violence specifically targeted toward Jews. Still, though of Jewish ancestry Marx's language toward Jews was hateful and vicious. See, e.g., Karl Marx, *On the Jewish Question*, (1843); KAI STRITTMATTER, WE HAVE BEEN HARMONIZED: LIFE IN CHINA'S SURVEILLANCE STATE (2020); PAUL JOHNSON, INTELLECTUALS: FROM MARX AND TOLSTOY TO SARTRE AND CHOMSKY, 52-81 (1990) (quoting Marx); accord DOUGLAS MURRAY, THE WAR ON THE WEST, 176-79; PAUL JOHNSON, *Marxism vs. the Jews*, COMMENTARY MAGAZINE (April 1, 1984); BERNARD LEWIS, SEMITES AND ANTI-SEMITES: AN INQUIRY INTO CONFLICT AND PREJUDICE, 112 (1999); MARVIN PERRY AND STEVEN SCHWEITZER, ANTISEMITISM: MYTH AND HATE FROM ANTIQUITY TO THE PRESENT, 154-57 (2005).

<sup>243</sup> “Hitler was a Socialist,” “The Nazis Hated Capitalism,” “The Nazism Didn't Believe in Private Property,” and “Socialism Encourages Eugenics.” See RAND PAUL, THE CASE AGAINST SOCIALISM, 139-61 (2019). Hitler's own words bolstered this conclusion. He linked socialism, nationalism, and antisemitism and promised: “A time will come when it will be obvious that socialism can be realized only in conjunction with nationalism and antisemitism. See GOTZ ALY, WHY THE GERMANS? WHY THE JEWS? 120 (2011). accord CHRIS TALGO, *Hitler Was a Socialist Who Learned from Karl Marx. Here are the Quotes to Prove It*, 1818 Magazine, July 6, 2020 at <https://the1818.com/2020/07/hitler-was-a-socialist-who-learned-from-karl-marx-here-are-the-quotes-to-prove-it/>. Cf. Recognizing the strong affinity between Nazism and Communism, Hitler said, “we National Socialists wish precisely to attract all socialists, even the Communists; we wish to win them over from their international camp to the national one.” *Id.* Echoing this, Nazi Propaganda Minister Joseph Goebbels said: “give me a fully committed communist and I'll make him a Nazi inside a month.” See DAVID MAMET, RECESSIONAL: THE DEATH OF FREE SPEECH AND THE COST OF A FREE LUNCH, 108 (2022).

<sup>244</sup> The Nazis' Twenty-Five point platform forbid Jews from being citizens, and called for: the nationalization of major industries; termination of national trusts; government control of banks and credit sources; prohibitions on charging of bank interest; breaking up of large corporations; the closure of all national banks; confiscation of “war profits;” profit sharing of the proceeds of nationalization and of large corporate income; seizure of land without compensation for “communal benefit;” communal work programs; confiscation and regulation of “unpatriotic” profits; full equality of all non-Jewish Germans; force employment of all citizens for the communal benefit; ruthless war against enemies of the community; replacement of “materialist” law with “communalist” law; communalization of all department and large stores; state control of all culture; state control of all

Socialist demonizing rhetoric is binary. Socialist leaders promote class envy and warfare – rich versus poor, haves versus have-nots, exploited versus exploiter. Nazism aimed to be a white, supremacist Aryan First, Jew-hating, identity-politics, intersectional, ethnically hierarchical, caste-system based combination of socialism and fascism.

Professor and journalist, Gotz Aly, deftly explored this interplay in a series of award-winning books. Aly saw Nazism as exploiting a desire for German national cohesiveness coupled with the sinister socialistic exploitation of envy, jealousy, vengeance, and scapegoating Jews. And *In Why the Germans? Why The Jews?: Envy, Race Hatred, and the Prehistory of the Holocaust*, he wrote:

The rise of a social anti-Semitism rooted in Gentile Germans' envy of their Jewish fellow citizens was accompanied by the increasing dominance of collective nodes of thought. The tendency to prioritize the native collective over the rights of individuals made it more difficult for leaders within the social-democratic and liberal movements to recognize the danger of anti-Semitism and to combat it effectively. The anxiety that the German majority felt about the disproportionately successful Jewish minority produced not only hatred on the social fringes but also a dangerous indifference within the social mainstream to attacks on Jews.<sup>245</sup>

In a binary Marxist way, popular during the tough economic times and national humiliation, prioritizing collectivism over individual rights of life, liberty, and property became Nazi policy such that Nazi and Communist hard-core base support came from the largely interchangeable increasingly dependent proletariat and working-class bases leading Aly to conclude:

The political platform of the Nazi Party was rooted in two nineteenth-century ideas with revolutionary connotations that could easily be combined with anti-Semitism. One was the concept of an ethnically homogeneous nation: the other was the idea of social equality. The Nazis promised the lower classes greater social acknowledgment and better opportunities for social advancement.<sup>246</sup>

By combining elements of nationalism, socialism, fascism, and identity politics Nazism resembled other socialistic, tribalistic movements of the Twentieth and Twenty-first Centuries. Thus, in *Hitler's Beneficiaries:*

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education; state control of all healthcare; breaking up of corporations; agrarian reform including redistribution of farmlands for "communal purposes;" and forbidding land speculation. See Yale Law School Library, *The Avalon Projects: Documents in Law, History, and Diplomacy*, at <https://avalon.law.yale.edu/imt/nsdappro.asp>

<sup>245</sup> ALY, *supra* note 244, at 122.

<sup>246</sup> *Id.* at 120.

*Plunder, Racial War and the Nazi Welfare State*, Aly wrote that the “Nationalist Socialist German Workers Party was founded on a doctrine of inequality between races, but it also promised Germans greater equality among themselves.”

In practice, Aly added, this goal “was achieved at the expense of other groups, by means of a racist war of conquest.” “That” he continued, “was the key to the Nazis’ popularity, from which they derived the power they needed to pursue their criminal aims. The ideal of the *Volksstaat* (a state of and for the people) was what we would now call a welfare state for Germans with the proper pedigree.”<sup>247</sup> In modern parlance, this was identity group politics-based socialism.

For Aly, Nazi state-organized and abetted theft and redistribution of Jewish businesses and property, more than “anti-Semitic predilections” or nationalism, accounted for the popularity of tyrannical Nazi rule in Nazi-occupied Europe.<sup>248</sup> A key attraction of Nazism, he contends, was the material economic benefits it afforded Hitler’s Aryan “beneficiaries,”<sup>249</sup> who turned a blind eye to Nazi atrocities directed at Jews in exchange for short-term economic and other tangible favored ethnic group benefits. Profiting from the dispossession of Jews,<sup>250</sup> increasingly inured Hitler’s beneficiaries to Jewish suffering and Nazi atrocities.

Such constituted much of the mob appeal of national socialism. Socialist playwright George Bernard Shaw’s observed that any “government who robs Peter to pay Paul can always depend on the support of Paul.”<sup>251</sup> But with the Nazis, as with other socialist movements led by Mao, Pol Pot, Mugabi, and others, the robbery merely proceeded incrementally to mass murder. Driven by class division or more modern forms of identity politics, the theft and redistribution of targeted minorities’ property have often been a path to absolute, or near absolute, single-party power.

As Aly explained, such “enthusiasm” can “be observed wherever a part of society claims the right to nationalize other people’s property, justifying that act with the rationale that the beneficiaries make up a homogeneous and theretofore underprivileged majority, the ‘people’ itself.”<sup>252</sup>

But in claiming such a right, the Nazis also fomented and exploited a millennium-long history of antisemitism. In the years before and after World War I, following Jewish European emancipation and overcoming centuries of

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<sup>247</sup> See GOTZ ALY, *HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE* 13 (2007).

<sup>248</sup> *Id.* at 6.

<sup>249</sup> See generally *id.*

<sup>250</sup> *Id.* at 183-333.

<sup>251</sup> BERNARD SHAW, *EVERYBODY’S POLITICAL WHAT’S WHAT?* 263 (1944)

<sup>252</sup> *Id.*

persecution, German and Austrian Jews disproportionately moved into the middle class and even prospered.<sup>253</sup>

While many German and Austrian gentiles - particularly shopkeepers, small business owners, artisans, retirees, clerical workers, government employees, and trade workers saw their economic and social status sharply diminished.<sup>254</sup>

Pensions were wiped out, and savings evaporated.<sup>255</sup> Many citizens on fixed incomes became dependent on charitable and government handouts or resorted to begging on the streets.<sup>256</sup> Inflation became so rampant, due mainly to excessive government spending and printing of money, that wheelbarrows filled with Deutschmarks were needed to buy groceries and everyday necessities.<sup>257</sup> Out-of-control inflation undermined two pillars of bourgeois-capitalist, liberal society: “respect for property and trust in the monetary system,”<sup>258</sup> dire conditions described by Nobel Prize-winning economist John Maynard Keynes this way:

Germany's pre-war capacity to pay an annual foreign tribute has not been unaffected by the almost total loss of her colonies, . . . by the cession of ten percent of her territory and population, of one-third of her coal and of three-quarters of her iron ore, by two million casualties. . . by the starvation of its people for four years, by the burden of a vast war debt, by the depreciation of her currency to less than one-seventh its former value, . . . by Revolution at home and Bolshevism on her borders, and by the unmeasured ruin in strength and hope of four years of all-swallowing war and final defeat.<sup>259</sup>

These harsh conditions became fertile ground for National Socialists, Communists, anarchists, and other radicals. With faith in traditional western liberal institutions and Enlightenment values shattered, Y.B. Yeats poetically described this era as *The Second Coming* when “things fell apart, the center failed to hold.”<sup>260</sup> An economic, political, and societal breakdown opened a power vacuum that the Nazis exploited to ratchet up and later fully institutionalize illiberal, antisemitic, and racist policies that Hitler promoted

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<sup>253</sup> ALY, *supra* note 244, at 13-41.

<sup>254</sup> *See, e.g.*, ROBERT O. PAXTON, *EUROPE IN THE 20<sup>TH</sup> CENTURY*, 217-18 (2<sup>nd</sup> Ed.) (1985).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Germany's Hyperinflation-Phobia: Germany's Dangerously Patchy Recollection of Interwar Economic History*, THE ECONOMIST, NOV. 15, 2013.

<sup>258</sup> ALY, *supra* note 244, at 120.

<sup>259</sup> JOHN MAYNARD KEYNES, *ESSAYS IN PERSUASION* 7 (1963) (originally published in 1919 as THE ECONOMIC CONSEQUENCES OF THE PEACE).

<sup>260</sup> WILLIAM BUTLER YEATS, “The Second Coming,” Poetry Foundation, available at <https://www.poetryfoundation.org/poems/43290/the-second-coming> (1915).

in his autobiography *Mein Kampf (My Struggle)*.<sup>261</sup> Yet, according to Aly, “while antisemitism:”

was a necessary precondition for the Nazi attack on European Jews, it was not a sufficient one. The material interests of individuals first had to be brought together with anti-Semitic ideology before the great crime we now know as the Holocaust could take on its genocidal momentum.<sup>262</sup>

Profiting from corrupt bargains, Hitler’s beneficiaries would have few qualms about moving into a neighbor’s stolen apartment or home or buying a neighbor’s business or artwork for a song after Nazi policy forced that Jewish neighbor to flee his or her homeland or Nazi thugs shipped that Jewish neighbor to a concentration or death camp to be enslaved or murdered or both.)

According to Aly, the opportunistic desire to share in a massive state-orchestrated theft and re-distribution windfall of free or virtually free stolen confiscated property and businesses owned by Jews stolen had a mass appeal and also helped “stabilize” Germany’s economy.<sup>263</sup> “The decisions between 1933 and 1941 that progressively stripped Jews – initially in Germany and later of their rights and property,” Aly explained:

[W]ere made by various institutions and individuals, first and foremost, of course, by Hitler. Both the individuals and the institutions were guided by ideological group hatred, material interest, and political calculations. Nonetheless, to turn those plans into reality, the decision-makers needed both the approval of the minority of Germans who were politically active and the silent tolerance of the majority. . . . The majority of Germans profited materially in either direct or indirect fashion from the expropriation of Jews. Allowing ordinary people to benefit from discrimination made it easier for them to accept their role as tacit accomplices.<sup>264</sup>

But such theft and redistribution had to be rationalized and justified. And, so, it was. Nazi ideology of entitlement, like socialist ideology generally, inured Germans and Nazi collaborators throughout the Third Reich to the theft and redistribution of property which the Nazis and their allies stole from Jews. The Nazis stole art and other valuable possessions owned by Jews living under the Third Reich without due process and justified Nazi theft (as well as the redistribution of such property) on the basis of what they contended to be Aryan privilege and Aryan-group entitlement and to settle what they wrongly felt to be historical identity-based grievance based on a perverted Nazi sense of

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<sup>261</sup> See generally ADOLPH HITLER, MEIN KAMPF (1925).

<sup>262</sup> ALY, *supra* note 248, at 6.

<sup>263</sup> See generally *id.*

<sup>264</sup> ALY, *supra* note 244, at 205.

justice and hierarchical, intersectional-based order where Jews as group represented “lesser” human beings than Aryans as a group.

Given their distorted worldview, the Nazis sought to reshape and rebalance European society to be controlled by elite Nazi politicians and bureaucrats and to benefit Nazis and more broadly Aryans above and beyond other identity and social groups whom the Nazis in tribalistic-fashion viewed as inferior. While generally striving to pursue Marxist and other socialist policies and agendas, the Nazis did not look at individuals on an individual basis but rather as identity groups. Much like Hugo Chavez in Venezuela, though even more brutally, the Nazis practiced a form of what in modern parlance be referred to as identity-based socialism/fascism.

Just as the Communists relied on class warfare, the Nazis’ shaming and shunning of Jews would foreshadow Nazi-supported boycotts of Jewish businesses and soon thereafter riots destroying synagogues and Jewish stores (Kristallnacht).<sup>265</sup> Laws barring Jews from government and academic jobs led to laws barring Jews from marrying non-Jews (Nuremberg Laws) and to the further dehumanization of Jews. Laws forcing Jews to register property, and compelling Jews to emigrate led to laws coercing Jews to sell businesses and property for nominal amounts to Aryan Germans and Austrians and to the annihilation of millions of Jews in the death camps of Auschwitz, Belzec, Buchenwald, and Treblinka and to acclimating non-Jews to “ethnic cleansing” of Jews.

Nazi policy included: a) state-encouraged and institutionalized smearing and persecution of Jews; b) socialist-style concentration of all state power in the hands of an autocratic executive;<sup>266</sup> c) deprivation of citizenship and property rights of Jews; d) abridgment of civil liberties; e) theft and socialist-style confiscation and redistribution of Jewish property to those compliant with the Nazi agenda, and f) exterminating Jews to justify the deprivation of Jewish liberty and the dispossession of Jews.

Beware. History might not repeat but it does tend to follow certain patterns and has been said to rhyme such that there have been tribal wars, ethnic cleansings and genocides carried out in in the years after the Holocaust. Ominously, too, today’s resurgence of antisemitism, tribalism, identity-politics socialism, and efforts to create false historical narratives come as civil liberties and minority rights come faced sustained attacks during tough economic times from authoritarians, demagogues, and mobs as memories of

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<sup>265</sup> See generally MICHAEL BERENBAUM, “Kristallnacht,” in Encyclopedia Britannica. Also known as Night of Broken Glass or November Pogroms. From November 9-10, 1938, more than 1,000 synagogues were burned or damaged, 7,500 Jewish businesses ransacked, Jewish hospitals, homes, schools, and cemeteries vandalized, and an estimated 30,000 Jewish men arrested. Acting on a telegram from Heinrich Müller that “These [acts] are not to be interfered with,” police arrest victims and fire officials stood by as synagogues burned.

<sup>266</sup> The Enabling Act gave legislative and executive power to the Nazi party. The Nuremberg War Crimes Trials included a trial of German judges for blindly carrying out Nazi eugenic and other policies.

the Holocaust fade and become distorted by by modern-day “blood libels” and propaganda as the last generation that remembers the Holocaust passes.<sup>267</sup>

Such are dangerous times for Jews and other minorities because as Douglas Murray warned, “people with malign intent can run an awfully long way awfully fast.”<sup>268</sup> By heightening awareness and understanding of where dark forces lead, as Nazi-looted art cases do, such malign intent can be checked to form a guardrail against the dangerous, deadly, evil forces threatening humanity.

#### CONCLUSION

The Nuremberg War Crimes Trials marked a historical turning point, where victorious Allies sought transitional justice in courtrooms. Litigation of Nazi looted art cases continues that honorable tradition at a time of imperative need.

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<sup>267</sup> *Two-Thirds of Millennials, Gen Z Don't know that 6 Million Jews were Killed in the Holocaust, Survey finds*, USA Today, Sept. 16, 2020; Maggie Astor, *Holocaust is Fading from Memory Survey Finds*, N.Y. TIMES, April 12, 2018 (“Forty-one percent of Americans and 66 percent of millennials, cannot say what Auschwitz was. And 52 percent of Americans wrongly think Hitler came to power through force.”).

<sup>268</sup> DOUGLAS MURRAY, THE WAR ON THE WEST, 81(2022).



